United States Court of Appeals for the Second Circuit



APPENDIX

Docket 75-4204 No. 75-4204

IN THE United States Court of Appeals For the Second Circuit

OLIN CONSTRUCTION COMPANY, INC.,

Petitioner,

- us -

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION and SECRETARY OF LABOR.

Respondents.

APPENDIX

DONALD J. BALL Attorney for Petitioner Office & P. O. Address 436 South Salina Street Syracuse, New York 13202 Telephone: (315) 422-2148

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IN THE United States Court of Appeals For the Second Circuit

CLIN CONSTRUCTION COMPANY, INC.,

Petitioner,

-vs-

PETITION FOR REVIEW

OCCUPATIONAL SAFETY and HEALTH REVIEW COMMISSION, and SECRETARY OF LABOR,

Respondents.

PETITION FOR REVIEW TO COURT OF APPEALS.

Olin Construction Company, Inc. hereby petitions the Court for review of the decision of the respondent Commission dated July 23, 1975 affirming the decision and order of Judge David H. Harris, OSAHRC, dated May 29, 1974, in the matter entitled "Secretary of Labor, Complainant, vs. Olin Construction Company, Inc., Respondent, OSAHRC Docket No. 3485" pursuant to Section 10(c) of the Occupational Safety and Health Act of 1978, 29 U.S.C. 651 et seq. (hereinafter called "the Act") and alleges:

- Petitioner is, and at all times hereinafter mentioned was, a
 New York corporation, with principal offices in Camillus, Onondaga County,
 New York.
- 2. On June 18, 1973, the U. S. Department of Labor, Occupational Safety and Health Administration, pursuant to Section 9(a) of the Act and as a result of inspection made on June 13, 1973, issued a citation for an alleged serious violation of the Act as set forth in the Standard at 29 CFR, Section 1926.652(a). On June 20, 1973, a Notice of Proposed Penalty was issued

PETITION FOR REVIEW TO COURT OF APPEALS.

wherein the Department of Labor proposed a penalty of \$500.00 for said alleged serious violation of the Standard at 29 CFR 1926.652(a).

- 3. On June 20, 1973, the Department of Labor issued a second citation arising out of the same inspection for an alleged non-serious violation of the Act as set forth in the Standard at 29 CFR 1926.50(f) relating to posting of telephone numbers of physicians, hospitals and ambulances with no penalty proposed for such non-serious violation. This alleged violation was not contested by Peititioner and is not part of this Petition for Review.
- Petitioner, by a timely Notice of Contest, contested the citation and proposed penalty for the alleged serious violation.
- 5. On or about July 17, 1973, the Secretary of Labor filed a complaint with the respondent Commission alleging a serious violation of the Standard at 29 CFR 1926.652(a) as set forth in the citation served herein and sought affirmation of the citation and proposed penalty for such alleged serious violation.
- 6. On or about July 23, 1973, petitioner filed its answer to the complaint seeking dismissal of the alleged serious violation and the proposed penalty.
- 7. On September 25, 1973, a hearing was held before Judge David H. Harris, CSAHRC, at Poughkeepsie, New York.
- 8. By decision dated March 29, 1974, Judge Harris granted an informal request of the Secretary of Labor to amend the complaint to allege a serious violation of the Standard at 29 CFR 1926 52(b), instead of the Standard at 29 CFR 1926.652(a) as alleged in the complaint, and, as amended,

PETITION FOR REVIEW TO COURT OF APPEALS.

found petitioner to be in violation of the Standard at 29 CFR 1926.652(b) and assessed a penalty of \$500.00 for violation of said Standard.

- 9. By memorandum dated April 26, 1974, Robert D. Moran, Chairman, OSAHRC, advised the Secretary of the Commission that pursuant to his authority under 29 U.S.C. Sec. 661(1) he was directing a review of the decision of Judge Harris and parties were accordingly advised of such review by notice duted April 30, 1974.
- 10. By decision dated July 23, 1975, the decision of Judge Harris was affirmed by an equally divided Commission (there being only two members of the Commission at the time of decision).
- 11. Petitioner seeks a raview of the decision of the Commission, affirming the decision and order of Judge Harris, upon the grounds that:
 - a) the split decision of the Commission indicates that there
 was not sufficient evidence to support the decision of
 Judge Harris; and
 - b) the decision of Judge Harris is not supported by substantial avidence on the record considered as a whole; and
 - c) Judge Harris erred in using as the criteria for his decision "the substantial evidence, on the record considered as a whole." rather than the prependerance of evidence as required by the determination of the Commission; and
 - d) Judga Parris arred in allowing the Secretary of Labor to amend the complaint after completion of trial; and
 - e) Judge Farris erred in considering the testimony of an

PETITION FOR REVIEW TO COURT OF APPEALS.

inspector of the Department of Labor in his decision, contrary to his own ruling at the hearing herein; and

f) the evidence did not support a violation of the Standard set forth at 29 CFR 1926.652(a) as originally alleged in the complaint herein.

WHEREFORE, Petitioner prays that this Court review the within matter and issue an order setting aside and vacating the decision of the Commission affirming the decision of the Administrative Judge herein determining that Olin Construction Company, Inc. is in violation of the Standard at 29 CFR 1926.652(b) and assessing and requiring Olin Construction Company, Inc. to pay a penalty of \$500.00 for the said violation of the Standard at 29 CFR 1926.652(b).

Dated: Septemb at 20, 1975.

DONALD J. BALL Attorney for Petitioner Office & P. O. Address 436 South Salina Street Syracuse, New York 13202 Telephone: (315) 422-2148 5

COMMISSION'S DECISION, dated 7-23-75.



OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

1825 K STREET, NW WASHINGTON, D C. 20006

July 23, 1975

CERTIFIED #
RETURN RECEIPT REQUESTED

IN	REFERENCE	TO	SECRETARY	OF	LABOR	٧.
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OLIN CONSTRUCTION COMPANY, INC.

OSAHRC DOCKET NO.

3486

NOTICE IS HEREBY GIVEN TO THE FOLLOWING:

FOR THE SECRETARY OF LABOR

Francis V. LaRuffa Regional Solicitor U. S. Dept. of Labor 1515 Broadway Room 3555 New York, New York 10036

OF COMMISSION DECISION

FOR EMPLOYER

Donald J. Ball Attorney at Law 436 South Salina Street Syracuse, New York 13202 To wit: See attached.

FOR EMPLOYEES

FOR THE COMMISSION

Willia & m. Lughti

WILLIAM S. McLAUGHLIN EXECUTIVE SECRETARY

Judge David H. Harris, OSAHRC Presidential Building 6525 Belcrest Road Suite 1005 Hyattsville, Maryland 20782

COMMISSION'S DECISION, dated 7-23-75.

Cite:	19	OSAHRC	
-------	----	--------	--

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR,)
Complainant,)
v.) OSAHRC DOCKET NO. 3486
OLIN CONSTRUCTION COMPANY, INC.,	-
Respondent.	<u> </u>

MEMORANDUM DECISION

Before: MORAN, Chairman; and CLEARY, Commissioner:

BY THE COMMISSION: A decision of Review Commission Judge David H. Harris, dated March 29, 1974, has been before the Commission for review pursuant to 29 U.S.C. § 661(i) for more than a year. Rather than further delaying the disposition of this case until a third member is appointed to the Commission, the Commission as presently constituted agrees to decide this case at this time.

The Commission is equally divided on whether the evidence is sufficient to support the Judge's finding that the respondent failed to comply with 29 C.F.R. \$ 1926.652(b) which provides protective measures for "[s]ides of trenches in unstable or soft material, 5 feet or more in depth." Commissioner Cleary agrees with the Judge's disposition and reasoning. Chairman Moran finds that the inspector's approximation from an "eyeball" observation of a 72 inch marker is insufficient to establish that the depth of the respondent's trench

COMMISSION'S DECISION, dated 7-23-75.

was five feet or more.

Accordingly, the decision of the Judge is affirmed by an equally divided Commission. This decision has no precedential weight. Secretary v. Garcia Concrete, Inc., 18 OSAHRC ___ (Docket No. 2591, May 27, 1975).

FOR THE COMMISSION:

William S. McLaughlin EXECUTIVE SECRETARY

DATE: JUL 2 3 1975

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSSION

- - - - OSHRC EXECUTIVE SECRETARY

PETER J. BRENNAN, SECRETARY OF LABORUDGE'S DECISION REC'D MAR 29 1974
UNITED STATES DEPARTMENT OF LABOR,
FINAL ORDER ON
APR 29 1974

:

Complainant

DECISION

OSHRC DOCKET NO. 3486

OLIN CONSTRUCTION COMPANY, INC.,

Respondent,

UNITED STEEL WORKERS, LOCAL NO. 15480,

Authorized Employee Representative

APPEARANCES:

FOR THE SECRETARY OF LABOR

Francis V. LaRuffa
Regional Solicitor
Theodore T. Gotsch, Esq.
U. S. Department of Labor
1515 Broadway, Room 3555
New York, New York 10036

FOR THE RESPONDENT

Donald J. Ball, Esq. 436 South Salina Street Syracuse, New York 13202

Harris, Judge, OSHRC

This proceeding, pursuant to Section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. 651 et seq. (hereinafter the Act), was initiated by Olin Construction Company, Inc. (hereinafter Olin), the Respondent, by a timely Notice of Contest, to review two citations and a Notice of Proposed Penalty, issued by Complainant under the provisions of Sections 9(a) and 10(a) of the Act, respectively.

One citation, undated, was issued and served upon Olin on June 18, 1973, immediately following an inspection of Olin's workplace by an official of the Occupational Safety and Health Administration of the United States Department of Labor (hereinafter OSHA) (Tr. 17, 19, 143, C-1). This citation charges a serious violation of the standard at 29 CFR 1926.652(a) at a workplace under Olin's ownership, a ration or control at Route 55 in Poughkeepsie, New York, described as "Installation of 12" water main", in the following language:

Failure to shore, lay back to a stable slope or provide some other means of protection for employees who may be exposed to moving ground or cave-ins. This applies to all trenches 5 feet or more in depth.

The second citation, issued on June 20, 1973, alleges that, at the same workplace, during a trenching operation, Olin violated the standard at 29 CFR 1926.50(f) as follows:

Failure to conspicuously post the telephone numbers of physicians, hospitals or ambulances.

The latter citation does not allege that the charged violation is a serious violation within the purview of Section 17(k) of the Act. Both citations require immediate abatement.

A Notice of Proposed Penalty was issued on June 20, 1973 wherein Complainant proposed a penalty of \$500 for violation of the standard at 29 CFR 1926.652(a). No penalty was proposed for the charged violation of 29 CFR 1926.50(f).

The standard at 29 CFR 1926.652, Specific Trenching Requirements, provides:

(a) Banks more than 5 feet high shall be shored, laid back to a stable slope, or some other equivalent means of protection shall be provided where employees may be exposed to moving ground or cave-ins. Refer to Table P-1 as a guide in sloping of banks. Trenches less than 5 feet in depth shall also be effectively protected when examination of the ground indicates hazardous ground movement may be expected. (37 FR 27553-4; December 16, 1972)

The complaint herein, filed on July 17, 1973, alleges that Olin violated the said standard in that it "failed to shore, lay back to a stable slope or provide some other means of protection for employees who may be exposed to moving ground or cave-ins. This applies to all trenches 5 feet or more in depth." (Compl. para. V(1)) and recites a violation of the standard at 29 CFR 1926.652(f) in that "respondent corporation failed to [continuously] post the telephone numbers of physicians, hospitals or ambulances." (Compl. para. V(2)). The standard at 29 CFR 1926.652(f) has to do with providing protection for employees in bell-bottom pier holes

and it is obvious that the standard designation intended was 29 CFR 1926. 50(F) by the very language used in the allegation of violation both in the citation and in the complaint and the latter should be amended accordingly.

Olin's answer, filed on July 25, 1973 joins issue on the charge of violation of the standard at 29 CFR 652(a) (Ans. para. 5) and admits the allegation of violation of the standard requiring conspicuous posting of the telephone numbers of physicians, hospitals or ambulances made available by the employer (Ans. para. 6). Olin's determination not to defend against the allegation of violation of the standard at 29 CFR 1926.50(F) was re-stated at the hearing (Tr. 5).

The substantial evidence, on the record considered as a whole, supports the following findings of fact and conclusions of law.

Respondent, styled Olin Construction Company, Inc., is a corporation organized under the laws of the State of New York and maintains its principal office in Camillus in that State; it is engaged in a business affecting commerce within the meaning of Section 3(5) of the Act in that it is engaged in the construction business using materials and equipment moving in interstate trade and, in addition, does work outside the State of New York (Tr. 6-7); Olin's sales in 1972 approximated \$5 million; it employs about 150 persons daily and there is no evidence of prior violations of OSHA standards (Tr. 8-9).

On June 18, 1973, a compliance officer in the employ of OSHA, inspected a trench opened by employees of Olin at the site described in the citations herein (Tr. 46-47). As he approached the trench and while still

in his car, he saw 3 men at grade, and 2 men in the trench whose heads and shoulders were visible. He parked his car and walked to the trench. When he arrived at the trench no one was in it. He spoke to a man who gave his name as Seelman and identified himself as the foreman. The compliance officer displayed his credentials and in response to his question, Seelman said he had been in the trench with another man. A second man also said he had been in the trench and gave his name as Neville Pottinger. Seelman stated he thought the trench was about 2-1/2 feet wide and about 15 feet long. He said that they had located an underground cable which he pointed out (Tr. 12-13).

No one entered the trench after the compliance officer arrived on the scene. According to the compliance officer the soil looked unstable and appeared to be sandy and gritty. The walls were vertical at the point where the 2 men were seen in the trench (Tr. 14, 22). The ends of the cut were sloped down to the bottom (Tr. 14). Seelman, standing on the north side, placed the end of a wooden fold-out measuring rule (Tr. 38, 137) at the bottom of the trench. The compliance officer, on the south edge of the trench (Tr. 16), saw an electric cable conduit, the top and sides of which were clear of earth (Tr. 34-35). He assumed a squatting position and looking at the rule held by Seelman, with his eyes a few inches above ground level (Tr. 38-40), observed the 72" inch mark on the rule to be an inch or two above grade level (Tr. 15). Seelman, according to the compliance officer, agreed that the measure was approximately 6 feet (Tr. 16). The bottom of the trench was deeper than the exposed conduit (Tr. 136-141).

At this point, Olin's job foreman (Tr. 69) arrived and stated that the excavating was being done to locate an underground electrical cable and that it had been located. He then ordered the above-referred to Pottinger to stake the cable and issued orders to back-fill the trench (Tr. 17). Pottinger held a stake to mark the conduit while the trench was being back-filled (Tr. 135-136). There is little dispute that the trench was dug in ground which is characterized as fill (Tr. 103, 125), or that the trench was not shored (Tr. 80).

Curiously, Olin seeks to establish that the trench observed by the compliance officer on June 18 was less than 5 feet deep by the job foreman's testimony that the conduit was not located on June 18 and that it reopened the same back-filled trench on June 19 and had exposed the top of the electric conduit at a depth of 4 feet 6 inches (Tr. 85-86, 114, Exh. R-1, R-2). This position is subject to several infirmities. First, the trench on the 19th was opened from 2 to 4 feet away from the place where the trench was located on June 18 (Tr. 105). Secondly, the trench on June 18 was deeper than the top of the conduit, as we have seen, and thirdly, the job foreman's memory concerning the actual depth of the trench on June 18 and whether he participated with the compliance officer in taking a measurement at that time, is not clear (Tr. 81, 89, 99) although he came to the site after hearing that an inspection was in progress (Tr. 76) and was informed that a measurement had been taken of the depth of the trench in which the aforesaid Seelman had participated (Tr. 96, 100). I am satisfied that his failure to see the conduit on June 18 (Tr. 77, 84, 99), is subject

C

to the same infirmity. Lastly, Seelman, Pottinger and three un-named employees of Olin were on the scene during the inspection by OSHA's compliance officer on June 18. One of them, Seelman, allegedly held the rule in measuring the depth of the trench, another, Pottinger, allegedly held the stake marking the conduit as the trench was back-filled. Olin did not call these men as witnesses nor did it offer to explain their absence. These witnesses may naturally be inferred to be favorable to Olin and their testimony, it seems to me, would have been important corroboration under the circumstances of this case. See Perlman v. Shanck, 182 N.Y.S. 767 (1920); Laffin v. Ryan, 162 N.Y.S.2d 730 (1957); Case v. New York Central R. Co., 329 F.2d 936 (2 Cir. 1964); Gross v. Williams, 149 F.2d 84 (8 Cir. 1945); U.S. v. Cotter, 60 F.2d 689 (2 Cir. 1932).

It seems clear that the language used in the citation to describe the offense for failure to shore, was intended to charge a violation of the standard at 29 CFR 1926.652(b) rather than 1926.652(a). 1926.652(b) provides:

(b) Sides of trenches in unstable or soft material 5 feet or more in depth, shall be shored, sheeted, braced, sloped, or otherwise supported by means of sufficient strength to protect the employees working within them. See Tables P-1, P-2 (following paragraph (g) of this section). (37 FR 27554, December 16, 1972)

Complainant has moved that the citation and complaint be amended to allege a violation of the said standard at 29 CFR 1926.652(b). I perceive no prejudice which may result to Respondent here. The matter was fully tried as though the allegation had charged a violation of the latter standard rather than 29 CFR 1926.652(a) and Olin does not interpose an

objection to Complainant's prayer to amend (Letter December 20, 1973).

See, Sec. v. Brisk Waterproofing Co., Inc., OSHRC Docket No. 1046 (July 27, 1973).

Coming now to the question of suitable penalties, there is nothing in the record herein bearing upon this subject matter in connection with Olin's admitted violation of the standard at 29 CFR 1926.50(f) and I therefore assess no penalty thereon.

As for the violation of the trenching standard, I find it to be a serious violation within the meaning of Section 17(k) of the Act. Any trench which is more than 5 feet in depth, some 2-1/2 feet in width, dug in fill soil with perpendicular walls presents a substantial probability that death or serious physical harm could result to a person standing or working therein. See, Sec. v. National Realty and Construction Co., (D.C. Cir. December 13, 1973).

Olin was here engaged in attempting to locate an electric cable and conduit. The job foreman before 'eaving at 10:00 a.m., had issued orders to use the back-hoe to dig 1 or 2 feet and then dig by hand, alternating until the conduit was located (Tr. 78, 113). The compliance officer spotted two men shoulder deep in the trench as he drove by at approximately 1:30 p.m. By the time he parked his car and arrived at the site the two men were no near in the trench and it is not clear whether the men were aware that an inspection was imminent. The exposure, on these proofs, would be minimal in nature were it not for the fact that four days earlier, on June 14th, two of Olin's men had been ordered out of an unshored trench, in unstable soil

in the same vicinity, which was over five feet deep, about 30 inches wide and had vertical walls, by an inspector of the New York State Department of Labor (Tr. 54, 57, 63-65).

The fact that no accident had occurred may well be regarded as fortuitous and I find that under the circumstances of this case a penalty of \$500 is not unreasonable; and it is therefore

ORDERED that:

- 1. The complaint herein be and the same is hereby amended to delcte reference to the standard at 29 CFR 1926.652(f) in paragraph V(2) thereof and to substitute therefor the standard at 29 CFR 1926.50(f); and
- 2. The citation hereinabove which charges a serious violation for failure to shore or lay back a trench 5 feet or more in depth, be and the same is hereby amended to delete reference to the standard at 29 CFR 1926.652(a) and to substitute therefore the standard at 29 CFR 1926.652(b); and
- 3. The complaint herein be and the same is hereby amended to where reference to the standard at 29 CFR 1926.652(a) in paragraph V(1) thereof and to substitute therefore the standard at 29 CFR 1926.652(b);
- 4. Olin be and it is hereby adjudged to have violated the standards at 29 CFR 1926.50(f) and 29 CFR 1926.652(b) on or about June 18, 73 as alleged in the citations issued herein, as amended, and the said that one and each of them be and they are hereby affirmed; and

penalty of \$500 as and for the said violation of the standard at 29 CFR 1926 652(b).

MAR 2 3 1974

Dated:

Washington, D.C

DAVID H. HARRIS Judge, OSHRC

SECRETARY'S C'TATION FOR SERIOUS VIOLATION, dated 6-18-73.

Oce	U.S. DEPARTMENT OF LABOR superional Safety and Health Administration		
	ITATION FOR SERIOUS VIOLATION*	S3082 AREA 4170	08HA-1 NO. // 0 REGION
EMPLOYITE () Line Const. (Street P.O. Box ADDRESS ((City Camillus	Truction Corps		/203
An inspection of a workplace under your 11.4 - Adjacent to Man	spection it is alleged that you have violated the Occ	5, Town	Pought bed as follow
Scale add or regulation allegency violated	Description of sileged violation	alleged	on which violation corrected
29 CFR 1926.652(a) (page 27553) as adopted by 29 CFR 1910.12	tailure to shore, lay back to a stable slope or provide some other means of protection for employees who may be exposed to moving grow or eave ins. This app to all trenches 5 feet or more in depth.	James of the	ediately security tation
	Area Director's Signature N. Di Quela E. Sur	angel	
contest as provided for in the Act or, if cont Commission. Any employee or representative of emplo	stitute a finding that a violation of the Act has occur ested, unless the citation is affirmed by the Occupa RIGHTS OF EMPLOYEES oyees who believes that any period of time fixed in to contest such time for correction by filing a notice wi	tional Safety at	the correction

Any employee or representative of employees who believes that any period of time fixed in this citation for the correction of a violation is unreasonable has the right to contest such time for correction by filing a notice with the U.S. Department of Labor at the address shown above within 15 working days of the receipt by the employer of notice of proposed penalty or notice that no penalty is being proposed.

"No person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in such proceeding of because of the exercise by such employee on behalf of himself or others of any right afforded by this Act." Sec. 11 (c)(1) of the Decupational Safety and Health Act of 1970, 29 U.S.C. 651.

The law requires that a copy of the enclosed citation(s) "shall be prominently posted" in a conspicuous place "at or near each place a violation referred to in the citation occurred." It must remain posted until all violations cited therein are corrected, or for 3 working days, whichever period is longer.

.. ...

A serious violation, according to the Act "shall be deemed to exist in a place of employment if there is a substantial robability that death or serious physical harm could result from a condition which exists, or from one or more practices, ans, methods, operations, or processes which have been adopted or are in use, in such place of employment unless the emer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation." Sec. 17(k).

19

SECRETARY'S NOTIFICATION OF PROPOSED PENALTY, dated 6-20-73.

U.S. DEPARTMENT OF LABOR
Occupational Safety and Health Administration

53082 150
AREA REGION
4170 2

NOTIFICATION OF PROPOSED PENALTY

Mr. Sherman Olivi, Pars.
Oliv Construction Co., Idc.
TO: P.O. Box SS
CAMILLUS, N.Y. 13031

On the 184720 day of June, 1973, a Citation(s) was (were) issued to you in accordance with the provisions of section 9(a) of the Occupational Safety and Health Act of 1970 (84 Stat. 1601; 29 U.S.C. 651, et seq.) hereinafter referred to as the Act. You were thus notified of certain alleged violations of the Act, as specified in that Citation(s).

YOU ARE HEREBY NOTIFIED that pursuant to the provisions of section 10(a) of the Act, the penalty(ies) set forth below is/are being proposed, bases on the above Citation(s):

SERIOUS VIOLATIONS

Citation No.

.

Proposed Penalty

\$ 500.400

OTHER VIOLATIONS*

Citation No.

Item No.

Proposed Penalty

NONE

Total for All Alleged Violations \$500.100

[&]quot;In the case of each "other violation," the proposed penalty reflects a 50 percent adjustment factor for corrective action taken within the period prescribed in the citation. If a particular alleged violation is not corrected within this period, an automatic additional penalty of 50 percent will be proposed for each violation. However, if you contest an alleged violation in good faith before the Review Commission, the period for correction does not begin to run until the entry of a final order by the Review Commission affirming the citation. The proposed penalty is exclusive of such other additional penalty as may subsequently be proposed for failure to correct a violation within the abatement period.

SECRETARY'S NOTIFICATION OF PROPOSED PENALTY, dated 6-20-73.

The payment of penalties is to be made by certified check or money order, payable to the order of "Occupational Safety and Health-Labor." Remit to the Area Director whose address appears below.

YOU ARE FURTHER NOTIFIED that the aforesaid Citation(s), this Notification, and the proposed assessment shall be deemed to be the final order of the Occupational Safety and Health Review Commission and not subject to review by any court or agency, unless, within 15 working days from the date of receipt of this notice, you notify the official named below in writing that you intend to contest the Citation or this Notification of Proposed Penalty before the Review Commission. The Review Commission is an independent quasi-judicial agency with authority to issue decisions regarding citations and proposed penalties.

There is no requirement that this Notification be posted.

	Dated at 90 Chuze	LJ+	NY.	10007	ebi-	214	
of	June	_, 1973.		3 4	cuis.	20-	day

Area Director

Occupational Safety and Health Administration

U. S. Department of Labor

EMPLOYER'S NOTICE OF CONTEST, dated 6-28-73.

Certified Mail Return Receipt Requested

June 28, 1973

U. S. Department of Labor Occupational & Health Administration 90 Church Street New Y rk, New York 10007

Attention: Mr. Nicholas A. DiArchangel, Area Director

Re: Olin Construction Co., Inc. (Employer)
P. O. Box 55, Camillus, New York
Rte. 55 - Poughkeepsie, New York Construction

Gentlemen:

I am attorney for and representative of the above named employer.

Please be advised that the employer intends to contest the serious violation citation issued on June 18, 1973 and evidently hand delivered by CSH Officer Scott at the job site (see attached) and the proposed penalty of \$500.00 for such serious violation as set forth in your notice dated June 20, 1973 (see attached).

Please be further advised that this letter is being sent in clarification of the June 25, 1973 letter (copy attached) sent to you by the employer.

An examination or the information in my possession sent to the employer from its field representatives and from your office does not contain the June 18, 1973 serious violation citation or copy thereof. Would you please forward a copy of this citation to not.

I assume that all future pleadings and/or other communications concerning this matter will be directed to me for proper attention.

Your prompt cooperation is appreciated.

Very truly yours,

Donald J. Ball

DJB/ar
Encl.
cc: Mr. Sherman Olin, V.F.
Clin Construction Co., Inc.

U. S. DEPARTMENT OF LABOR

OFFICE OF THE SOLICITOR

NEW YORK, NEW YORK 10036

Tel. 212-971-7574

July 16, 1973



Olin Construction Company, Inc. P. O. Box No. 55 Camillus, New York 13031

Gentlemen:

Re: Brennan, Secretary of Labor, v. Olin Construction Company, Inc., respondent; and United Steel Workers, Local No. 15480, authorized employee representative.

You are informed that we have, this day, forwarded to the Occupational Safety and Health Review Commission, for filing, a complaint, copies enclosed wherein we are seeking affirmation of the citations and proposed penalties which you have contested.

Your answer to the complaint must be sent to the Commission within fifteen (15) days of its receipt, with a copy thereof to this office.

Sincerely,

Francis V. LaRuffa Regional Solicitor

Enclosures

cc: United Steel Workers, Local No. 15480, w/encl.

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY & HEALTH REVIEW COMMISSION

PETER J. BRENNAN, SECRETARY OF LABOR
UNITED STATES DEPARTMENT OF LABOR

v. : NO. 3486

OLIN CONSTRUCTION COMPANY, INC., :

Respondent, :

UNITED STEEL WORKERS, LOCAL NO. 15480, :

Authorized :
Employee Representative. :

COMPLAINT

WILLIAM J. KILBERG

FRANCIS V. LA RUFFA Regional Solicitor

THEODORE T. GOTSCH Attorney

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UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY & HEALTH REVIEW COMMISSION

PETER J. BRENNAN, SECRETARY OF LABOR UNITED STATES DEPARTMENT OF LABOR

OSHRC DOCKET

v.

NO.

OLIN CONSTRUCTION COMPANY, INC.,

Respondent,

UNITED STEEL WORKERS, LOCAL NO. 15480,

Authorized Employee Representative.

Representative. :

COMPLAINT

Inspection has disclosed that, at the times and in the manner hereinafter stated, the provisions of the Occupational Safety and Health Act of 1970 (84 Stat. 1604, 29 U.S.C. 651, et seq.), hereinafter referred to as the Act, and the Occupational Safety and Health Standards promulgated thereunder (29 C.F.R. Part 1926) have been violated. It is, therefore, averred and charged that:

I

Jurisdiction of this action is conferred upon the Occupational Safety and Realth Review Commission by section 10(c) of the Act.

II

The respondent, OLIN CONSTRUCTION COMPANY, INC., a corporation organized under the laws of the State of New York and doing business in the State of New York, maintaining an office and place of business at Camillus, New York, is and at all times hereinafter mentioned was engaged in construction work near Route 55, Poughkeepsie, New York.

III

Many of the materials and supplies used by respondent corporation were manufactured outside the State of New York and the respondent corporation was and is engaged in a business affecting commerce within the meaning of sections 3(3) and 3(5) of the Act.

IV

As a result of an inspection by an authorized representative of the plaintiff, respondent corporation was issued a citation for violations on June 20, 1973 pursuant to section 9(a) of the Act.

V

On June 18, 1973 as a result of an inspection conducted by a representative of the Secretary, the respondent was found to have violated the following Occupational Safety and Health Standards promulgated pursuant to section 6 of the Act at the worksite located at Route 55, town of Poughkeespie adjacent to the Hudson Gas and Electric, Manchester substation

- (1) 29 C.F.R. 1024.652(a) in that respondent corporation failed to shore, lay back as a stable slope or provide some other means of protection for employees who may be exposed to moving ground or caveins. This applies to all trenches 5 feet or more in depth.
- (2) 29 C.F.R. 1926.652(f) in that respondent comporation failed to continuously post the telephone numbers of physicians, hospitals or ambulances.

Pursuant to section 9 of the Act, the citation provided for abatement immediately upon receipt of the citation. Such period was a reasonable period for abatement of these violations.

VI

The violation alleged in the citation as set forth in paragraph V(1) above was a serious violation within the meaning of section 17(k) of the Act in that there was a substantial probability that death or serious physical harm could result from the condition alleged to exist and respondent, knew, or could with the exercise of reasonable diligence have known, of the presence of the violation.

VII

The violation alleged in the citation in paragraph V(2) was a violation within the meaning of section 17(c) of the Act and had a direct and immediate relationship to the safety and health of the employees on the work site.

VIII

On June 20, 1973, a notification of proposed penalty for the citations was served on the respondent corporation, proposing a penalty of \$500. In determining the amount of the proposed penalty, due consideration was given to the size of the business of the respondent corporation, the gravity of the violations, the good faith of the employer and the history of previous violations, as required under section 17(j) of the Act.

TX

On June 26, 1973, the respondent corporation filed with a representative of the Secretary of Labor, a notification of intent to contest the aforesaid citations and the proposed assessment of the penalty pursuant to the provisions of section 10(c) of the Act. This notification of intent to contest was duly transmitted to the Occupational Safety and Health Review Commission and jurisdiction of this proceeding is conferred upon the Commission by section 10(c) of the Act.

X

Several of respondent's employees are affected

by the violations reflected in paragraph V herein. The

authorized employee representative of the affected

employees is UNITED STEEL WORKERS UNION, LOCAL NO. 15480, an

unincorporated association maintaining an office and mailing

address at 104 Magnolia Street, Syracuse, New York. At all times relevant

the said local union was certified was the collective bargaining

representative of the affected employees of the respondent corporation

and at all times relevant herein it has had collective bargaining

agreements with the respondent corporation.

WHEREFORE, the aforesaid citations and proposed penalty should be affirmed.

/s/ William J. Kilberg
WILLIAM J. KILBERG
Solicitor of Labor

/s/ Francis V. LaRuffa
FRANCIS V. LA RUFFA
Regional Solicitor

/s/ Theodore T. Gotsch LEODORE T. GOTSCH Attorney

UNITED STATES DEPARTMENT OF LABOR, ATTORNEYS FOR PETER J. BRENNAN, SECRETARY OF LABOR.

EMPLOYER'S ANSWER, dated 7-23-73. UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY & HEALTH REVIEW COMMISSION

PETER J. BRENNAN, SECRETARY OF LABOR UNITED STATES DEPARTMENT OF LABOR

U.

OSHRC DOCKET NO. 3486

OLIN CONSTRUCTION COMPANY, INC.,

Respondent,

UNITED STEEL WORKERS, LOCAL NO. 15480, :

Authorized Employee : Representative. :

ANSWER

Respondent by its attorney, Donald J. Ball, for its answer to complaint herein:

- 1. Admits allegations contained in paragraph " I^{ε} of complaint.
- Admits allegations contained in paragraph "II" of complaint.
- Admits allegations contained in paragraph "III" of complaint.
- 4. Admits that a citation was issued to respondent on June 20, 1973 as alleged in paragraph "IV" of the complaint but denies that said citation complied with Section 9(a) of the Act in that said citation failed to describe with

EMPLOYER'S ANSWER, dated 7-23-73.

particularity the nature of the violation.

- of the complaint and affirmatively alleges that the allegations contained in paragraph "V(1)" fail to set forth any facts indicating that any violation actually occurred at the time and place indicated in the citation as required by Section 9(a) of the Act.
- Admits allegations contained in paragraph "V(2)" of the complaint.
- Denies the allegations contained in paragraph "VI" of the complaint.
- Admits the allegations contained in paragraph "VII" of the complaint.
- Denies the allegations contained in paragraph "VIII" of the complaint.
- 10. Admits the allegations contained in paragraph "IX" of the complaint.
- 11. Admits the allegations contained in paragraph "X" of the complaint.

EMPLOYER'S ANSWER, dated 7-23-73.

WHEREFORE, petitioner prays that the citation and proposed penalty for alleged violation of 29 C.F.R. 1926.652(a) be dismissed.

Donald J. Ball Attorney for Respondent Office & P. O. Address 436 South Salina Street Syracuse, New York 13202 Telephone: (315) 422-2148 MINUTES OF HEARING, dated 9-25-73.

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

PETER J. BRENNAN, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR

vs.

OLIN CONSTRUCTION COMPANY, INC.,

:Docket #3486

Respondent,

UNITED STEEL WORKERS, LOCAL NO. 15480,

Authorized Employee Representative.

32-34 Haight Avenue Poughkeepsie, New York

September 25, 1973 10:30 A. M.

BEFORE: HON. DAVID H. HARRIS

S. & S. REPORTING CO., INC. 132 Nassau Street New York, N. Y. WOrth 2-2915

APPEARANCES:

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FRANCIS V. LA RUFFA, ESQ.
Regional Solicitor
1515 Broadway
New York, New York
BY: THEODORE T. GOTSCH, ESQ., of Counsel

DONALD J. BALL, ESQ.
Attorney for the Respondent
436 South Salina Street
Syracuse, New York

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Thereupon,

Harold Swiss,

a machine Shorthand Reporter was duly sworn to faithfully and impartially record stenographically the said questions, answers and colloquy.

MR. GOTSCH: Your Honor, we are here today in thematter of Olin Construction

Company and the Secretary of Labor, I understand to prove that on June 18, 1973, Olin

Construction Company, while digging a trench in a work site located on the north side of Route 55 in the Town of Poughkeepsie, adjacent to the Hudson Gas and Electric, Manchester substation, did fail to lay back shoringor to use other equivalent means of protection to insure that employees who were working in this trench were protected from the hazard of moving ground or cables.

The Respondent contests this alleged violation of the regulation which is found in 29 CFR, 1926, 652(a). The Respondent also contests the seriousness of the alleged violation as well as the proposed penalties

five hundred dollars, and the Secretary

today will prove that such a violation did occur, was a serious violation and the proposed penalty of five hundred dollars was proper in this case.

JUDGE HARRIS: The Citation has been issued in addition.

MR. GOTSCH: That is correct.

JUDGE HARRIS: For violation of 29 C.F.R., Part 1926.

MR. GOTSCH: That Citation, I understand, was not contested.

MR. BALL: That is correct. There is no penalty.

MR. GOTSCH: That is not contested by the Respondent.

JUDGE HARRIS: The Respondent's Notice of Contest doesn't differentiate. It reads, "Please be advised that the Clin Construction Company Corporation intends to contest the Citation, 4017C, Region 2, dated June 20, 1973, before the Review Commission." The Complaint is based upon that Notice of Contest

and recites the allegation covering ?) C.F.R. 1926.652(a). If the Respondent does not desire to contest their allegation contained in the Citation, you will have to have a petition of withdrawal of contest with reference to that allegation.

MR. GOTSCH: Your Honor, I noticed in the Respondents and, sir, that they admitted all allegations with respect to that alleged violation. If you will note paragraph six of the Respondent's Answer, and he states that point, he admits the allegation contained in paragraph five of the Complaint, and that paragraph of the Complaint with regard to the violation of 29 C.F.R. 1926.52.

MR. BALL: That was the intent.

JUDGE HARRAIS: You don't intend to offer any defense to that allegation?

MR. BALL: No, I do not, Your Henor.

JUDGE HARRIS: All right. I suggested in my Order dated August 27th, that an effort be made to arrive at an understanding with reference to certain stipulations concerning

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whether there cannot be any reasonable dispute, such as on page 3 of the order, you will note, beginning with 9(a) the accurate name of the Respondent corporation. Can we have that?

MR. BALL: It is accurately stated there in the action: Olin Construction Company.

JUDGE HARRIS: Company written out?

MR. BALL: Company, Inc.

JUDGE HARRIS: I-N-C ?

MR. BALL: A New York corporation in Camillus, New York.

JUDGE HARRIS: The Answer concedes,
I understand, that the Respondent is engaged in a business affecting commerce.

MR. BALL: That is correct.

JUDGE HARRIS: Within paragraph 35 of the statute. Now, in what respect could you describe for me, sketchily or shortly, how it 's engaged in the business which affects commerce?

MR. PALL: The Respondent generally

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is engaged in the type of construction business, the material which is purchased would come into interstate commerce as the equipment it uses would be part of interstate commerce. I think it actually does work outside of the state from time to time, so that it would be engaged in interstate commerce.

JUDGE HARRIS: There is the question of ownership of any equipment that is not involved.

MR. BALL: There was no injury.

JUDGE HARRIS: No?

MR. BALL: No.

JUDGE HARRIS: All right. What is the relative size of the Respondent's business in comparison, if you can give it to me?

MR. BALL: That is difficult. I discussed that with the company officials. They are not from this area. I do not know the comparative situation with other businesses.

JUDGE HARRIS: Similarly engaged?

MR. BALL: Similarly engaged, I have to plead ignorance on that:

JUDGE HARRIS: Can we have any approximation of sales.

MR. BALL: Approximately five million dollars in 1972.

JUDGE HARRIS: Is there a history of any previous violations?

MR. GOTSCH: Well, I don't know that it was taken into account at the time the Citation was drawn up. The State Department of Labor, Division of Industrial Safety had posed a Citation for the same type of violation only a few days prior to the inspection in question.

JUDGE HARRIS: Is there any dispute about that fact?

MR. BALL: I did not know until
this morning there would be someone from
the New York State. He walked in and we
saw the gentleman --

JUDGE HARRIS: If you intend to use that as a matter of proof, we will pass that

for the time being.

There is no stipulation?

MR. BALL: I might state that there is no OSHA violation prior to this time.

MR. GOTSCH: As far as we know there was no violation prior to this time with respect to the Federal law.

JUDGE HARRIS: It is always a matter of proof on the part of the Complainant. What is the average daily number of employees?

MR. BALL: Approximately one hundred and fifty.

JUDGE HARRIS: The Citation was processed when and where?

MR. BALL: Processed the day of the Citation at the field office on Route 376 in Poughkeepsie, New York.

JUDGE HARRIS: You may or may not make an opening statement. There is no requirement.

MR. BALL: We deny the facts.

JUDGE HARRIS: Call your first witness,

Mr. Gotsch.

Thereupon,

EDWARD SCOTT,

of 230-32 138th Street, Kew Gardens, Queens, New York, was duly called as a witness for and in behalf of the Secretary of Labor, United States Department of Labor, and being then and there duly sworn by Judge Harris, assumed the witness stand, and upon examination, testified as follows:

DIRECT EXAMINATION

BY MR. GOTSCH:

- Q Mr. Scott, by whom are you employed?
 - The Department of Labor and Occupational Safety and Health Administration.
- Q Where is your office located?
 - A 90 Church Street, New York, New York.
- Q How long have you been so employed?
 - A Two years.
- Q How many inspections have you made in the course of that employment?
 - A Over two hundred. I don't know the exact figure.

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- Q Have you inspected construction firms during the last two years?
 - A Yes.
- Q How many inspections would you estimate?
 A I would have to say approximately half
 my time is spent in the construction industry.
- Q Could you approximate the number of inspections?

 A Approximately one hundred.
- Q Mr. Scott, on June 18, you came across the condition that led you to recommend a Citation for alleged violations of Occupational and Health Standards. Can you explain to the Court what you observed and what caused you to make that recommendation?
 - Me have been told and instructed to stop and inspect trenches to comply with the Federal regulations. I was driving east on Route 55, and I observed some --

JUDGE HARRIS: Route 55. Where is that located?

THE WITNESS: Poughkeepsie.

A(Conty) I was coming out of Poughkeepsie and was to take

the Taconic State Parkway. I observed some construction equipment on the north side of Route 55, and when I got closer, I saw there was an opening, there were three men standing on rade level above what was a trench, and there were two men in a trench, and I could see their helmets as I was driving up and the tops of their heads and shoulders. I turned off the road and parked the car on the south side of Route 55, adjacent to the cut . I started, I got some equipment out of the car and I started to walk across the road and I was looking the area over and I saw something that turned out to be a posting from the State, and I went directly there and read it, and the State had ordered not to enter trenches unless shored and I went from there, from the poster, I went to the trench. The two men had since come out of the trench, and I asked who the foreman was and Mr. Seelman identified himself as a foreman. I identified

Edward Scott for Complainant, Direct. 13 myself, asked him if he was the man that I saw in the trench and he said yes, he was, and another fellow, I asked him to identify himself was Neville Pottinger. I asked if he was in the trench and he said he was. I explained I looked at the trench and I gauged it to be approximately six feet. No measurements were taken. The width of the trench, I questioned Mr. Seelman about that, and he said it was about two and a half feet wide and I asked him how long the trench was and he , said the length was approximately fifteen feet. I asked him how deep he was going and he said he was trying to locate an underground cable, and that they had located it,

and he showed me the cable and said that is

as deep as they were going to go. I ex-

plained that people were -- I was advising

them not to work people in this trench be-

cause of the seriousness of the condition.

One moment. What condition did you feel was serious with respect to this trench?

- The soil itself looked to me to be unstable. I didn't see any clay conditions or any rock. It seemed to be sandy and gritty and it looked like it could move at any moment. There was heavy traffic moving down Route 55.

 They also had machinery adjacent to the trench, a back hoe adjacent to the trench. There was a back hoe, and they were moving that around it.

 Mr. Scott, did you observe any sloping with respect to this?
- A No sloping. It was a vertical cut to the side. There was sloping as far as the length went and after the measurements it sloped in grade, and it went down to where the conduit was and at one point it was approximately six feet in depth.
- When you said it was a vertical cut, that was at the point above the conduit?
 - A That is where the two men were in the area of the conduit.
- And that the angle of the vertical cut would be what?
 - A Ningty degrees.

- Q Did you observe any shoring or other protective devices in the trench?
 - A No shoring, no protective devices.
- Q And, Mr. Scott, did you cause the trench to be measured for depth?
 - A Yes. I mentioned that I had a tape in the car, and I was going to get it. Mr. Seelman said he had a tape. He produced the tape, and I asked him if he would put it into the trench and place it at the tip on the bottom. I got down at an eye-ball level and it was approximately six feet. The seventy-two inch marker was just maybe an inch or two above the grade.
- Q Did anyone go into the trench at this time to measure?
 - A No.
- Q Would you have ordered anyone to go to the bottom of the trench?
 - A No.
- Q Who was holding the tape measure?
 - A Mr. Seelman.
- Q Where was he standing?
 - A He was on the north bank.

- Q Where were you standing?
 - A On the south bank.
- Q You stated that you saw, getting down to ground level, you observed the tape to be at the approximate seventy-two inch mark?
 A Right.
- Q At grade level?
 - A Right. I stood up and said that measure was approximately six feet and he agreed. He didn't get down and look at it.
- Q Did you observe the bottom of the tape on the bottom part of the excavation?
 - A I saw him placing it there.
- Q Now, did you discuss this with any other official of Olin beside Mr. Seelman?
 - A Mr. Schreppel. He drove up in a truck and he told me that he was the foreman in charge of the operation, and from that point on I directed my conversation to Mr. Schreppel. I told him I thought the condition was serious and that it posed an imminent danger and I asked him if he had intention of placing anyone in the trench and he said 'No." They were trying

to locate an underground cable. They located it. I think he ordered Mr. Pottinger to stake it and he ordered the machine operator to back fill. I talked to him about OSHA and I told him there was a violation of the standards and I considered it to be serious, and I asked him if there was a union representative at the site. The union representative was not there. We went and we located a union representative. He chose not to involve himself in the inspection, in the process of what was going on. We went to the field shack for Olin. I called my office and I explained the conditions as I saw them to my supervisor and he ordered me to issue a serious Citation and deliver it to the company representative and that process was carried out. I spoke to a Mr. Gava (phonetically), had a closing conversation with Mr. Schreppel and advised him of his rights under the Act, his contest rights and the employees' obligation to notify our agency when the conditions are corrected.

Q Mr. Scott, did you observe anything else that

pertained to the stability of the soil?

- A Yes. While I was discussing the seriousness of the condition with Mr. Schreppel, the
 north bank slid and a piece, about, and these
 are just approximate, eye-balling, I would say,
 about a foot long, maybe eight inches, slid
 into the side of the bank, and maybe two feet
 in depth, same down and slid into the bottom
 of the trench.
- Q Was this where the men had been working previously?
 - A This was directly in that area.
- And did you have any other further discussions in your closing conversation ?
 - A I spoke to Mr. Clin by telephone. I explained the conditions that I had seen and he was dismayed. He couldn't understand why anyone would be in an unshored trench. I started to give him a closing conference over the telephone, to let him know what his contest rights were. He kept using the words that he knew that I had a problem, not that he had a problem, I had a problem because I discovered

Minutes of Hearing, dated 9-25-73.
Edward Scott for Complainant, Direct. 19

this, and the message I got, which wasn't direct,
now is that some disciplinary action was possible.

JUDGE HARRIS: Pon't tell us what you thought. If you said anything to Mr. Olin, you may repeat it. If he said anything to you, you may repeat that.

THE WITNESS: He told me there would be disciplinary action taken and some people would probably lose their jobs as a result of my discovery of this condition.

- When you first arrived at the scene, Mr. Seelman identified himself as the foreman?
 - A That is correct.
- Q And it was Mr. Seelman who helped you measure the depth of the trench?
 - A Yes.
- Now, you stated that you issued an immediate Citation on the spot; is that correct?
 - A After I contacted my area office, I was instructed to issue the serious Citation at that time.

- Mr. Scott, what factors went into your calculations that led you to issue that serious Citation?
 - A The fact that there was a violation of the standards and that as the result of that violation, and an accident did occur, and if an accident did occur, it would cause serious physical harm and possibly death.
- Q The standards involved requires shoring or sloping over what depth?
 - A Over five feet.
- Q Over five feet. And you found no shoring, sloping or other protective devices?
 - A No.
- Q Or equivalent means of protection?
- Mow, at a later date, you were back in your office, and you prepared another Citation and Notice of Proposed Tenalty. Could you state for the Court, what Eactors were indicated in assessing the proposed penalty?
 - A Is this on the serious or non-serious?
- On the non-serious. That is the only one in

A On the non-serious, the fact -I mean on the serious penalties.

On the serious, it was, there was an automatic thousand dollar penalty assessed when we reached the serious stage. The discounts were given, full discounts for ten per cent. The employers, the fact that when I spoke to Mr. Olin on the phone and he said he had a complete safety program, I took his word for this, and because he had set that program up and said he was aware of OSHA and doing everything to comply, and he indicated the program was part of their desire to comply, I gave him a complete discount. I gave him twenty per cent off that. History, we had no history of any action being taken against the company, and twenty per cent discount was granted for that. You didn't take into account the poster you saw from the State Department?

. No.

Q Ultimately, the proposed penalty that was served upon Olin was how much?

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- Five hundred dollars.
- And following your administrative guidelines, you gave them a full credit for good faith and history, is that correct?

Yes.

- Now, could you just describe the soil conditions at the trench that you observed? I would say loose and likely to crack. It was unstable. There had been rain in the morning. Most of the crew, according to Mr. Schreppel had been sent home because of the weather conditions and it looked like it was going to go and part of it did go while I was talking to him at the site.
- Would you characterize the soil there as solid rock, shale or cemented sand and gravel? No.
- You stated earlier that the vertical cut was at a ninety degree angle.
 - A Yes, where I observed the employees in the trench.

MR. GOTSCH: I have no further questions.

CROSS-EXAMINATION

BY MR. BALL:

- Mr. Scott, were you on a routine examination in Poughkeepsie?
 - I was completing an investigation of the trenching that took place in the town, in the City of Foughkeepsie.
- Q Had you completed that?
 A. Yes.
- You were on your way out of town?
 - A. Yes.
- Q You observed this particular trenching operation?
 - A Right.
- As I understand you to say that your department had made the trenching operation an important part of your operation?
 - A Yes.
- You have been employed by OSHA for how long?
 A Two years.
- Q Did I understand you to say you made approximately two hundred inspections under OSHA?
 - A Yes, sir.

- Approximately one of those were in the construction field, is that correct?
 - A Yes.
- The construction field is a large field.
 - A. Yes.
- Q How many of those were actually trenching operations?
 - I have to give you an estimate. I would say twenty.
- And you had approximately twenty trenching operations in approximately two years in your experience in OSHA?
 - No, the trenching operations were, I would say, in the last six months.
- Q What was your occupation prior to working for OSHA?
 - A Aircraft mechanic, President of a local union.
- You had no experience in this type of construction work prior to this time?
 - A No.
- Completely new to you when you went to OSHA?
 - A Yes, sir.

- Had OSHA provided you with some kind of training course?
 - A Yes.
- In soil inspection, and stability?

 Safeguarding for trenches.
- Just what the regulation specified?

 A Yes.
- No training program, as such, on how to evaluate on what kind of soil there is?

A No.

- As I understand it, on June 18th, you were driving out of Foughkeepsie?
 - A. Yes.
- East on Route 55, when you observed a trenching operation?
 - A. Yes.
- Had anybody told you about this particular trenching operation prior to this time?

 No.
- Did you emphasize that was being placed on the trenching operation by your department, and you stopped and observed it; is that correct?

- A Yes.
- Q Where did you park?
 - A There was a fruit stand or farm stand or shopping center adjacent to the entrance. I parked in a parking lot on the outside of Route 55.
- Q On the outside of Route 55? At about what time was that?
 - A Approximately 1:30 F.M.
- You parked at 1:30, approximately? What did you do after you parked?
 - A I got some forms out of my car, out of the trunk, and I got my hard hat on, and I started to cross the road.
- You parked and then obtained some information,

 put on your hard hat and walked across the

 street with some blank forms. What kind of

 blank forms?
 - A OSHA forms.
- Q Citation forms?
 - No, not citation forms. They are required when we do an inspection. They give us information on the company, number of employees,

the type of operation.

I understand, Mr. Scott. And you walked directly across the street to where there was a trenching operation?

A No, I did not.

- Q What did you do?
 - A I started for the trenching operation and saw the poster on the side of the entrance to the power station that the state had posted and walked over and read that.
- Q Was this on a fence?
 - A On a board; it was posted on a board.
- You just describe for Judge Harris, assuming you are standing on the south side of the road at 55, you are looking across, north across, just tell us, describe to the Court what it looked like?
 - A There was a poster, and I am reaching from my memory, I think it was outlined in red, and it was on a board, tacked onto a board.
- Q Can you describe the site itself?
 - A. There were no sidewalks.

- Q Was there a driveway?
 - A Entranceway to the power station.
- And was that a roadway?
 - Yes. It was not paved. It looked like part of the area had been flattened out by vehicles' use.
- Q It was unpaved?
 - A Yes.
- Q It was not black-topped?
 - A No.
- You say you saw this red sign or whatever it was from across the street?
 - A. While I was crossing the street I observed it.
- You went directly there, is that correct?

 A Yes.
- Q You read it?
 - A Yes.
- What did you do after that, Mr. Scott?

 A I approached the trench, and I asked who was in charge. Mr. Seelman identified himself, and I identified myself.
- Q You approached the trench?

- A. Yes.
- Will you describe to the Judge what was going on at the time you approached the trench?
 - 1. It looked to me --
- Not what it looked like; exactly what you saw.
 - It looked like everybody was waiting for me there. They were all there in a group.
- I want you to describe what took place not what your feelings were.
 - A It is not a feeling.
- ? How many men were there?
 - A Five men.
- Q Where were they?
 - They were on the roadway of the trench, on the south side of the trench. One fellow was on the far side, not the north side, on the west side and he was the back hoe operator.
- There was a back hoe on the side?
 - A Yes.
- Q Where was that?
 - They had been digging in the trench. It was placed at the west end of the trench. It was in position there to dig. The shovel was down

into the west end of the trench.

Was it actually digging at the time that you were there?

A No.

When you first approached?

A No.

Q Did it ever dig after you were there?

A No.

Q So that the depth of the trench never changed during the time that you were there and observed, is that correct?

A Correct.

- From the point of view where the bucket was on the west end of this trench to the place where it was opened toward the east, I understand you to say it was fifteen feet?
 A Approximately fifteen feet.
- And the back hoe, of course, would straddle

 1. the fence, is that correct?

 2. Yes.
- Q How wide was that trench that was dug before the back hoe?
 - A I asked Mr. Seelman and he said --

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- I am asking you for your observation, not Mr. Seelman's?
 - A Approximately two and a half feet.
- Q Did you measure that at all?
 - . I did not.
- You just show the Judge how far two and a half feet is?

JUDGE HARRIS: Let the record show that he indicated by holding his hands apart.

- Was there a slight pitch to the side of the trench?
 - A It was vertical.
- Q No slope at all?
 - A No slope.
- Q Do you know what kind of a back hoe was being used?
 - A No.
- You have any experience with back hoes?
 - A Observing them.
- Q Do you know that there is what we call a bucket on a back hoe?

A Yes.

- Was that part of the equipment?
 - A That is used to scoop the dirt.
- You know whether that comes in various widths?

 A They do, yes.
- And there are various sizes, is that correct?
 - A Yes.
- And do you know what size bucket was being used on this particular piece of equipment at this time?
 - A No, I don't.
- So that actually you made no measurement of the width, is that correct?
 - A That is correct.
- Q Of the trench?
 - A No.
- Was there any slope at any point to this trench?
 - A. The ends were sloped.
- I am thinking of the east end of the trench,

 Mr. Scott. That slope would have been about
 a ninety degree slope, as I understand you to
 say?

- No. The east end, the ends were sloped, the east and the west, the sides. The north and south, they were not sloped.
- I say the east end, was that sloped about ninety per cent, as I understand from your testimony or a ten per cent slope? Did you testify there was a slope?

JUDGE HARRIS: Do you recall what you said about the slope on the east end?

THE WITNESS: I don't recall making that testimony. The east end and west end were sloped.

JUDGE HARRIS: What was the approximate degree of the slope, that was vertical?

THE WITNESS: In the area, thirty to forty-five degrees, it is a guess.

- Mr. Scott, didn'tyou under direct examination in response to a question by Mr. Gotsch state that there was an angle of ninety per cent?

 A Ninety degrees vertical on the side, not the end.
- You saw the equipment and you saw approximately five men standing around the trench in various

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locations, when you came over to the trench,
is that correct?

- A After I parked the car.
- At that time?

A Yes.

- Now, will you tell me what happened immediately after that, you came over to the trench and there was equipment and five men standing around, tell me what happened at that point?

 A I identified myself, Mr. Seelman identified himself. I asked the two men who were in the trench to identify themselves. One was Mr. Seelman and the other was Mr. Pottinger.
- They were in the trench?

 A They were in the trench, not when I crossed the road.
- And did you look into the trench?

 A Yes.
- What did you see?
 I saw conduit. They had unearthed the conduit.
- Will you describe the conduit to the Court?

 A It is encased in a congrete sleeve. It

was brown in color so it looked like it could have been dirty, or I thought that it was ceramic on the exterior.

- Q What part of the conduit did you see?
 - A. The casing.
- Q All around it?
 - A Top and the sides were clear. I could see the sides nearest me and the top.
- Q How deep was the conduit?
 - A Approximately six feet.
- Q The conduit itself?
 - A The conduit was approximately six feet.
- The actual depth of the conduit was about six feet?
 - A Yes.
- The top of the conduit went down to the bottom?

 A You asked me how deep.
- What was the depth of the conduit?

JUDGE HARRIS: You understand the question?

THE WITNESS: No.

JUDGE HARRIS: You say you don't understand the question?

THE WITNESS: I don't understand.

You saw the conduit?

4. Yes.

A I don't know the measurement.

- Did you see the depth of the conduit? Was it supposed to go all the way down?
 - A Not all the way down. A side of it was exposed. I don't know if it was --
- You say you could see the side of it?

 A Yes.
- Q Dut you could see a certain depth on the side of the conduit?

A Yes.

- Now, what is the depth of the entire trench?

 The same depth of the side that was exposed?

 A I don't understand the question.
- You had a trench with a bottom on it, and you saw a conduit, and it was the whole trench? Did you go to the depth of the lowest point upon which you could see the depth of that conduit?

A No.

JUDGE HARRIS: The floor of the trench was not even?

THE WITNESS: It was sloped from the end to the conduit. The depth was for about four feet, and it started sloping toward the end.

- Started at the east end? There was a gradual slope from that point down to the lowest point of the conduit that was observed, and that was the same thing into the west end?
 - A Yes, sir.
- There was a gradual slope all the way down wherever it was supposed --
 - A The angle from the west end was not graduated as much as the east end.
- Will you continue with your story, your testimony, Mr. Scott, and tell us what happened after you made this observation for the people when you talked to them.
 - Yes. I told them the trench was not shored.

 I told them it appeared to be more than five
 feet in depth and the Federal standards required shoring and grounds such as I had asked if

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anyone had a tape, and I told them mine was this tape, and Mr. Seelman said he had a tape, and we measured the depth of the trench.

- At that point, what kind of tape was it?

 A It was a wooden, fold-out type.
- And what did Mr. Seelman do?

 A He opened it up. He placed it at the bottom, into the trench.
- Q Did you observe where it was placed in the bottom?
 - A On the bottom, on the north side of the conduit.
- Q On the north side of the conduit?

 A Right.
- Q Close to the conduit?
 - A Right.
- And did you make an observation as to the depth at that point?

A Right.

- Q How did you do that, Mr. Scott?

 A I got down near the grade, and I looked neross.
- Q On your hands and knees?

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- A Squatted, leaned over.
- Was your eye ground level on the south side?

 A No, I, myself, were a few inches above the ground level.
- Q Did you run anything across?
 - A No.
- So that when you said it was approximately seventy-two inches, is that what you were saying?
 - A Yes.
- That was an eye-ball observation as to what the ruler actually said?
 - A Yes.
- There was no accurate determination made at that time.
 - . That is correct.
- Is that the only measurement ever taken by you?
 - A Yes.
- Mr. Scott, if the trench was wider than two and a half feet, that meant you would be farther away from the point at which the tape was inserted, is that correct?

- A It is possible. It would be a few inches more.
- Did Mr. Seelman just stand on the edge of the trench and go down?
 - . He was fairly close to the edge of the trench.
- And just inserted the ruler straight down?
 - A. He held it down.
- Q So if there was -- did he have his hand extended?
 - A He did, as he seemed to have it in an upright, vertical position.
- Q Where were you?
 - At this point I was directly across the way from M: Seelman.
- You were on the edge of the trench?
 - A. Close to it.

JUDGE HARRIS: From the point where you were, could you see the bottom of the trench?

THE WITNESS: No, sir, not when I looked across it, I couldn't see the bottom of the trench. I got down pretty close to

- No one went into the trench at this point?

 A. No.
- After you made that measurement, what happened at that point?
 - I explained the regulation that it had to provide for sloping and shoring, and while I was talking to them, I told them I would have to consult my office. There was a possibility that a Citation would be issued on the spot, and during the course of this conversation, a section of the north bank of the trench gave in and caved in and slid into the bottom.
- There was nobody in the trench?
 - A. No one was in the trench.
- About what time was that, if you recall?
 - A Between 1:30 and 2.
- How long were you there at the site?
 - A I have to refer to my notes.
- Q Let me tell you that the Citation is dated 3/10, if that would be helpful.
 - A I would say maybe an area of thirty to forty minutes, because we did some driving

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around. That time should be accurate.

- And while you were talking, is that correct, someone else came to the site?
 - A There was another fellow, an engineering associate, or something like that. I think his name was Mr. Crocco.
- Did there come a time when a person who identified himself as the foreman on the job came to see you?

A Mr. Schreppel.

- What happened after Mr. Schreppel arrived at the scene?
- A I directed my conversation to Mr. Schreppel and explained the conditions to him again.
- Q Prior to Mr. Schreppel, had there been any back-fill in the trench?

A No.

- When Mr. Schreppel arrived, the trench was in exactly the same condition as when you observed it?
 - A Yes.
- Wr. Scott, I think you had said that in effect when you got to the trench site, that one

of the men there said they had located the conduit, is that correct?

A Yes.

- Could observe that conduit, where it could have been located?
- · A Yes.
- After the arrival of Mr. Schreppel, then you went back to what was called the site, where the site office was and you had further discussion with Mr. Schreppel at that time?

A I got a little confusion now. We spoke to a shop steward. I am not sure if we went to the shop steward or the field office first.

You wound up, anyway, at the field office, is that correct?

A Yes.

- You called your office at that time?

 Yes.
- You were directed to issue and deliver a Citation for a serious violation?

A Yes.

- Q Did you do that?
 - A. Yes, I did.

- Are you completely aware and advised of the various standards of regulations issued by the OSHA for this type of operation?
 - A I am familiar with the standards.
- Is there a standard referring to what has been done in order to locate underground utilities?
- No, I know there was a standard for it.

 Is it a requirement that prior to doing any trenching that the contractor is supposed to locate underground and establish the underground utilities prior to digging in that particular area?
 - A Yes, he is.
- From your observation, Mr. Scott, is that what the contractor was doing in this particular situation?
 - A He was trenching to locate, yes.
- Were the men working around there other than at this particular point where you were, any other Olin men working in this area, except for the five men, the equipment that was at that particular area at that particular time

- / No.
- Do you know what the contractor was actually doing at that point?
 - A I think he was laying a water line. He was, I am -- I don't understand the question.
- O Do you know how far the work had progressed on the installation that was being made by the contractor at that time?
 - A No, I don't.
- Q Did you observe any line, water line, or sewer line, or any kind of pipe line being laid?
 - A No.
- Was there any other open trench adjacent or contiguous except that which you observed at that time?
 - I didn't observe any.
- Where did you go after you made your telephone call to your office, Mr. Scott?
 - After I made the phone call?
- Q Yes.
 - A I did some paper work at the field office.
- Where did you go then after you completed your

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delivery of your Citation that you gave to

Mr. Schreppel? Your business at that particular area was finished?

A Yes.

- Q Where did you go after that?
 - I headed for the Taconic, but I don't really know where I went. I ended up driving like a nut. I got lost. I asked for directions back to 55, and I ended up, I finally ended up asking for directions and I was back to Pough-keepsie. I spent a long day.
- Were you staying in Poughkeepsie that night?

 A. I know I went across the bridge.
- O Did you come back the next day?

 A No.
- Was the time that you have been discussing, June 18th, 1973, the only time that you were at that particular site?

A Yes.

- Never observed it after that or before that, is that correct?
 - A I saw the site when I was doing the other investigation, but I didn't see any work in that

area. I was going back and forth to Foughkeepsie.

- When was that? The day before?
 - A Somewhere around June 7. I don't believe they were in that area.
- Were you investigating a facility in the City of Foughkeepsie?
 - A. Yes.
- Q When did that occur?
 - 1. On June 8th.
- You were travelling this route back and forth?
 A Yes.
- You observed this trenching on June 18th, the date you had given, did you see any work being carried out in that area?
 - A I saw work, but not near the power house. I saw them digging and handling pipe while I was driving back and forth.
- You knew there was some construction?
 - A. Yes.
- This was the only day you stopped?
 A That is right.
- You said also that while you were in the field office, you had a conversation with a Mr. Olin.

- A Someone identified himself as Mr. Sherman Olin.
- I was going to ask you the first name.

MR. BALL: I think that is all.

JUDGE HARRIS: Any redirect, Mr.

Gotsch?

REDIRECT EXAMINATION

BY MR. GOTSCH:

Mr. Scott, when the measurement was taken, you were standing on the south side of the cut, Mr. Seelman was on the north side.

Could you have stepped across that cut or jumped across if you so desired?

A I --

MR. BALL: I object to that. I don't know how far he could jump.

JUDGE HARRIS: Don't answer the question. A objection was made. I Suppose this would be going to the evidence, toward establishing the width of the cut, and all we will have is a man's own estimate of his broad-jumping ability. I will let you put that in.

Could you have easily stepped across or would it have taken some effort?

MR. BALL: I object to the characterization, to the word "easily."

JUDGE HARRIS: Reframe the question.

- Could you have stepped across, Mr. Scott?
 - A I could have straddled it.
- In other words, you could have placed one foot on one bank and the other foot on the other bank?
 - A I could have scraddled it.

JUDGE HARRIS: I assume that would mean putting one foot on one end and the other foot on the other end.

When Mr. Schreppel appeared on the scene, did you describe the depth of the cut to Mr. Schreppel?

A I did.

Q Did he contest the fact of your observation of the feet?

Mr. Scott, what, if anything, did Mr. Schreppel say when you handed him a Citation which described a cut of six feet in depth?

- When I gave him the Citation, I gave him a receipt with the Citation, and I wrote an approximate measurement of the cut on the receipt, and I told him these are approximate measurements, and nobody took any accurate reading on that trench. I told him -- Mr. Seelman was in the room when I gave him the receipt and I asked him if he had read it and seen it. It was a return copy for me, for my office, and he was hesitant about signing it. I said it is a part of the process "but, if you don't want to sign it, I will ask someone to sign, saying you were here, and I will do it myself." There was no great reaction.
- Was anything said with respect to the depth of six feet?
 - A Nothing said.
- How far was the cut from Route 55? You said it was on the north side of Route 55. Now many feet would you say to the roadway?
 - A I don't know. I would say that -
 JUDGE HARRIS: If you don't know,

 don't say.

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Q Would you estimate it --

MR. BALL: I object.

MR. GOTSCH: I have no further questions.

JUDGE HARRIS: Mr. Scott, when you approached the trench in the first instance, going up the unpaved truck approach, alongside or leading to the power station, you said there was a back hoe at the west end of the trench.

THE WITNESS: Yes.

JUDGE HARRIS: Was that back hoe running?

THE WITNESS: It was not running.

The shovel was down and in the west end.

JUDGE HARRIS: The engine was not running?

THE WITNESS: No.

JUDGE HARRIS: Now, in connection with your assessment of the proposed penalty, you allowed, I think you said, ten per cent for size.

THE WITNESS: Yes, sir.

JUDGE HARRIS: Based on the fact that there were four or five men available present on the site?

THE WITNESS: Yes. The questioning at the site -- Mr. Schreppel was not sure of the size of the company.

JUDGE HARRIS: And you allowed twenty per cent for good faith and it was based on your telephone conversation with Mr. Olin and he advised that he had a safety program which was enforced by the company.

THE WITNESS: Yes.

JUDGE HARRIS: There was no history of prior violations with OSHA, as far as you know?

THE WITNESS: None to my knowledge.

JUDGE HARRIS: Did you allow anything for abatement as Compliance Officers do?

THE WITNESS: We asked for an immediate abatement.

JUDGE HARRIS: There was no allowance given for the expected abatement?

THE WITNESS: No, sir.

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JUDGE HARRIS: Is there anyone here from the United Steel Workers Local Number 15480 in Syracuse?

No one is responding. Let the record show that there is no one responding. (Witness is excused.)

JUDGE HARRIS: Call your next witness.

Thereupon,

BERT E. TOMPKINS, JR.,

of Box 219 Wingdale, New York, was duly called as a witness for and in behalf of the Secretary of Labor, United States Department of Labor, and being then and there duly sworn by Judge Harris, assumed the witness stand, and upon examination, testified as follows:

DIRECT EXAMINATION

BY MR. GOTSCH:

- Q By whom are you employed?
 - A The Department of Labor.
- Q Where is your office, sir?
 - A 30 Green Street, White Plains.
- Q Mr. Tompkins, for how long have you been so

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employed by the Department of Labor?

A I commenced work 2/22/52.

- Q Mr. Tompkins, did there come a time when you observed a construction site here in Poughkeepsie?

 A Yes.
- Q Operated by Olin Construction Company?

 A Yes.
- Q When was that, sir?
 A June 14.
- Q What conditions did you observe?

MR. BALL: I am going to object to this, Your Honor. It is not pertinent to the question. Mr. Tompkins may have observed it, but this has no parity.

MR. GOTSCH: The reason I have
Mr. Tompkins on the stand is that he saw
a similar condition and he was in there
the same day, and it also has some bearing on the history of the firm.

MR. BALL: I object to the characterization of the similar condition.

MR. GOTSCH: The other factor, I would like Mr. Tompkins to explain poster

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that Mr. Scott had observed at the job site.

JUDGE HARRIS: Would there be an effort of connecting up Mr. Tompkins' testimony with that of Mr. Scott's? By that I mean, are we going to be told that the cut is the same cut?

MR. GOTSCH: No. It is my understanding that it is not the same cut that Mr. Scott saw.

JUDGE HARRIS: Why is Mr. Tompkins -- why has he been called? What is the purpose of his testimony?

MR. GOTSCH: The purpose of his testimony is to describe why he felt it necessary to post a Citation at the same job site.

JUDGE HARRIS: For another cut or for some other condition?

MR. GOTSCH: It was to be a violation of the same standards, Your Honor, physically separated by some feet --

JUDGE HARRIS: I suppose it is being offered to go toward the reasonableness of

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the penalty.

MR. BALL: If it is only for that purpose, although it is being conceded that there was no previous OSHA penalty, which it is a matter to be taken into consideration.

JUDGE HARRIS: There might not be any previous record of a confession of the situation which would support the position.

MR. BALL: If it is for that purpose, and restricted to that purpose, then I would not object completely.

JUDGE HARRIS: The objection is being withdrawn. This witness' testimony is to be confined entirely to penalties and previous position.

MR. GOTSCH: That is right.

- Mr. Tompkins, you were present on June 14th, is that correct?
 - A Yes.

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Q Could you describe what observation you made on June 14th?

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- A I arrived at the job site on that date, and I observed two men in the trench or the north side of Route 55. The trench was at the entranceway at the power substation.
- What action did you take when you arrived at the job site?
 - A I looked at the depth of the trench, observed it was more than five feet in depth and ordered the men out of the trench.
- Q Did you take any measurement?

 A I did, sir.
- Q With what device?

 A With a six foot folding rule.
- Mr. Tompkins, you stated you ordered the men out of the trench. Did you take any further action at that point?
 - A I posted an unsafe notice as required.
- An unsafe notice? What were the conditions that you imposed in that notice?
 - A I issued an order to provide and install adequate filling and bracing against the banks of the trench.
- Q Mr. Tompkins, you heard Mr. Scott's testimony.

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Was the trench you observed the same, in the same location as their trench?

A It was a conduit.

MR. BALL: I object. This is mere speculation.

JUDGE HARRIS: You were there four days earlier?

THE WITNESS: I was there on the 25th, too.

JUDGE HARRIS: June 25?

THE WITNESS: Yes, sir.

JUDGE HARRIS: That is a week later?

THE WITNESS: Yes, sir.

I passed that job several times from within the county of Dutchess across which I normally take to the City of Poughkeepsie, and I ride past that site.

MR. EALL: There is no testimony beyond June 18.

JUDGE HARRIS: That is true.

Q Mr. Tompkins, your posting, in effect, was a plied to the trench in question that you observed?

A. Yes, sir, and all continuous trenching in that

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job site.

JUDGE HARRIS: Such as might have been over five feet?

THE WITNESS: Five or more feet in depth. As long as that tag is posted, there is no further work that can be done in the trench, or any continuation of that trench until it has been properly shored and put back into safe angle.

If you had returned at a later date, and found an unshored trench in that location, what action would you have taken?

MR. BALL: Objection.

JUDGE HARRIS: Sustained.

- Is there any procedure that a New York State
 Inspector would follow on a return visit if
 posting requirements had not been there?

 Yes, sir.
- Could you explain that to the Court?

MR. BALL: Objection.

JUDGE HARRIS: Sustained. I don't see how that is relevant.

Were there any representatives of Olin present

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when you posted this job site?

- A Gerald Schreppel.
- Q Did you discuss this matter with him?
 A I did, sir.
- What, if anything, did you explain to him with respect to the trenching requirements?

 A I instructed him that, in accordance with the law, any stretch more than five feet in depth must be shored or the back cut to an angle of repose.
- Q Did Mr. Schreppel respond to this in any way?

 A The trench was back-filled at that time.
- So that the trench was filled in while you were present?
 - A Yes.
- Q You left the job site on the 14th?
 - A Yes, sir.

MR. GOTSCH: I have no further questions.

CROSS-EXAMINATION

BY MR. BALL:

Your observation, I understand, was on June 14?

A Yes, sir.

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- The work had progressed up to the early side of the driveway, leading into the substation, is that correct?
 - A The date that I made the inspection, the driveway was torn up.
- The progress had gone through the driveway?

 A Yes, sir.
- And will go through the west side of the driveway, is that correct?
 - A Up until they came to an underground electric conduit.
- Q On the 14th?
 - A Yes, sir.
- And they had located the conduit on the 14th?

 A They did not, sir.
- And they laid pipe, as it were, up to this point?
 - A The pipe was laid approximately on the east end side of the driveway, leading into the substation.
- There was a trench across the entire entranceway to the substation?
 - A Yes, sir.

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- Olid you observe the trench directly to the east of that?
 - A To the east of what, sir?
- To the east of where they were at the point on June 14.
 - A The only trench was up to the location of the underground.
- Q Have you seen the trench on the 13th?
 A Yes, sir.
- Q Where were they at that time?
 - I think in the general vicinity, slightly east of the entrance into the power substation.
- Q How far back, Mr. Tompkins?

 A I did not get out and measure. I drove by.
- Q Did you see it on the 12th?

 A I did not, no.
- Q How about the 12th?
 - A No.
- Q The 11th?
 - A I don't know, sir.
- Q Would you say there were a series of entrances?
 - A I would have to say sc.

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- Would you let me finish my question?
 - I would not permit myself? As I stated earlier, I did not get out and measure. I did not make an inspection on the 14th.
- Did you observe the soil conditions at that time?
 - A Yes, I did, sir.
- This was in the driveway?

 A In the driveway.
- Q Driveway?
 - A Yes, sir.
- Now far into the driveway did you observe?
 A I only observed the condition of the soil at the bank, adjacent to the trench.
- You saw a driveway, didn't you?

 A I am not interested in the driveway.

 I am interested in the soil.
- I was asking you, adjacent to the soil of the bank of the trench, how wide was that trench?
 - A Approximately thirty inches, sir.
- Q Were they laying pipe at that point?
 - A Pipe had been laid up to the east side of

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the driveway leading into the substation.

- ? The trench extended beyond that?
 - A In a westerly direction, yes, sir.
- Q How many feet?
 - A I would say approximately twenty feet was open at the time I made the inspection.
- This was on June 14th; is that correct?
 - A Yes, sir.

MR. BALL: I have no further questions.

REDIRECT EXAMINATION

BY MR. GOTSCH:

- ? How would you characterize the soil and the cut that you observed?
 - A Unstable soil, likely to crack or crumble.
- Did you happen to measure the back hoe?
 Did you observe the back hoe?
 - A I observed the back hoe.
- Q Could you estimate the size of the bucket?

 A Bucket? I did not get the size of the bucket. My chief concern was --

MR. BALL: I object to this.

JUDGE HARRIS: I think it is part

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of your answer.

THE WITNESS: I only observed, I did not observe the size of the bucket. I did inspect the width of the trench and the size of the soil and whether the men in there were in the trench working, and if shoring had been installed or banks were sloped or at a safe angle of repose.

Q Did you consider the angle to be a safe angle of repose?

MR. BALL: Objection.

JUDGE HARRIS: On June 14.

A The banks were vertical.

And that would be a ninety degree angle?

A Ninety degree.

MR. GOTSCH: I have no further questions.

MR. BALL: No further questions.
(Witness was excused.)

JUDGE HARRIS: Thank you, Mr. Tompkins.

MR. GOTSGH: With the testimony of these two men, the Secretary of Labor rests its case, Your Honor.

MR. BALL: I would like to move at this time that the specifications as set forth in the Complaint be dismissed on the basis that the testimony of Mr. Scott shows, by his own admission, that the measurements were taken by him, and there were no definitive measurements taken of the trench at the time of the alleged violation and that the estimate of six feet is only an estimate. It is an eye-ball estimate taken against the ruler, which was stuck into the depths of the trench, and that there were no accurate measurements upon which the testimony can rest, Your Honor.

JUDGE HARRIS: I think there is enough in the evidence, Mr. Ball, to require going forward and I deny your motion.

(The hearing was recessed for lunch and returned at 1:00 P.M.)

AFTERNOON SESSION 67

Thereupon,

GERALD M. SCHREPPEL,

of 28 Cayadutta Street, Johnstown, New York, was duly called as a witness for and in behalf, of the Respondent, and being then and there duly sworn by Judge Harris, assumed the witness stand, and upon examination, testified as follows:

DIRECT EXAMINATION

BY MR. BALL:

JUDGE HARRIS: Kindly state your name for the record.

THE WITNESS: My name is Gerald M.
Schreppel. I live at 20 Cayadutta Street,
Johnstown, New York.

JUDGE HARRIS: Mr. Schreppel, keep your voice up and talk slowly and nicely, and easily, so we can understand you.

- Q By whom are you employed?
 - A Olin Construction Company.
- Q How long have you been employed by Olin Construction Company?
 - A Approximately ten years.
- Q In what capacity have you worked with the Olin

Construction Company?

- I started out with them as a laborer, pipe layer, and then I went into being a foreman.
- Is that your present position?

 A Yes.
- Q Foreman?
 - A Yes.
- Did you have experience in the construction business prior to your employment with Olin?

 A I have worked a little in the building trade.
- And your experience on underground is confined to Olin; is that correct?

A Yes.

- Over the past ten years?

 A Yes, sir.
- On June 18th, 1973, were you employed by Olin?

 A Yes, sir.
- Where were you employed, Mr. Schreppel?

 Doughkeepsie, New York.
- Q What was your position that time?

A Pipe Foreman.

- Where were you working, if you recall, on June 18th, 1973?
 - A Poughkeepsie, New York, Route 55.
- Were you in charge of the crew prior to June 18th, 1973, working on Route 55 as a foreman at that time?
 - 4 Yes, sir.
- Q Can you explain or tell the Court, approximately your path of work up to June 18th? Let us say for the week prior to that time, where were you working prior to that time?
 - A Route 55 I was working.
- What were you installing at that time?
 A Water main.
- Q Main water line?
 - A Yes.
- Q What size pipe was it? .
 - A Twelve inch.
- How far, if you recall, had you been working on Route 55 before arriving at this point on June 18, 1973?
 - A Probably, I will make a rough guess, thirty-five hundred, four thousand feet.

Was this the entire job, to your knowledge,
the entire Clin job, just working on Route 55?

A No, no. We worked over on Route 376,
and all side streets off the road.

MR. BALL: May I go off the record,
Your Honor?

JUDGE HARRIS: No need to go off the record.

Subsequent witnesses will testify -will you tell the Court, Mr. Schreppel,
what you were doing on June 18, 1973, in
connection with working for the Olin job
on Route 55?

THE WITNESS: We were in the process of locating underground telephone conduits on Route 55.

- C Telephone --
 - A Powerlines .
- Q Do you recall what day of the week the 13th was?
 - A It was, I do believe it was a Thursday.

JUDGE HARRIS: He is trying to ascertain which day of the week it was.

MR. GOTSCH: I have a calendar here.

I'd like to show you a calendar to refresh your recollection.

JUDGE HARRIS: It fell on a Monday.

THE WITNESS: On a Monday?

JUDGE HARRIS: June 18th fell on

Monday.

THE WITNESS: Yes, sir.

- Q Did you have a crew on June 18th?

 A Yes, sir.
- What were the weather conditions on June 18th?
 A Rain.
- Were you laying pipe?
 A No.
- Q On June 18th?

A No.

- A Yes, sir.
 A Had you come to a point in your construction
 When you were looking for an electrical conduit?
- Was the conduit in the line of your work?

 A. Yes, sir.
- We agree that Route 55 runs basically east and west?
 - A Yes, sir.

- Where were you laying this pipe in reference to Route 55?
 - A I was laying from east to west. I had laid up to the edge of a driveway that I believed was the Central Hudson Power Station.
- That was on the edge of the driveway?

 A The east, the east edge of the driveway.
- Had you been advised concerning an electrical transmission line across the line of the trench?
 - A Yes, sir.
- Q What steps were taken, Mr. Schreppel, to locate that conduit by you?
 - A I had a crew in there with a back hoe.

 We dug in depth probably two feet, and I had

 men in the hole to hand-dig to see if they

 could locate the conduit without ripping into

 the hole. At that time we didn't know the

 exact depth.
- Have you contacted the power company?
 A Yes, sir.
- What had you been advised by the power company:
 - 1. That there was power in there; that they didn't

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know if it was in the cement conduit, in a casing pipe, or if it was in a cement encasement, or in a steel encassed pipe, or if it was loose pipe, loose cable.

Q Did they give any indication as to the approximate location of this conduit?

A The approximate location was painted on the highway on Route 55 on the west edge of

the driveway that goes to the power station.

- Q That was the west end edge?

 A West edge, yes, sir.
- Q When was the last day that you actually laid pipe prior to June 18 on Route 55?
 - Λ I believe that would be the 14th.
- That was the previous Thursday, was it?

 A Yes.
- Q Will you describe to Judge Harris the soil conditions where that pipe was laid?
 - A Yes, sir. Rock.
- Q Did you have to blast?

 A. We had to blast. We blasted before we went into digging it.
- What about the topography? Starting with

Route 55, was it level all the way northward?

- A Across the sidewalk.
- Q There was a sidewalk?
 - A Yes, sir.
- Q Then there was a hill?
 - A Yes, sir. A rock bank on the ledge on the north side.
- Q That sloped down through Route 55?
 A To the edge of the sidewalk.
- Q Had there previously been a sidewalk along the edge of 55?
 - A Not all along in this area.
- Q In this area.
 - A Yes.
- Had you done something to the sidewalk in the driveway leading to the power station where your trench was running?
 - A Yes, sir.
- Q Had you removed it?
 - A Yes, sir, we removed the black top across the driveway from east to west, loaded it, and trucked it out.
- Q Did you direct, on June 18th, did you direct a

crew to go out and try to locate a conduit about which you had been informed?

A Yes, sir.

- Q Did you go with them at that time?

 A Yes, sir.
- Q And get them started?

A Yes, sir.

- You were there while they were digging?

 A When they first started, yes, sir.
- Q When they first started?

A Yes, sir.

- For how long were you there at that time?

 A I would say probably, an hour and a half, maybe two hours.
- Q About what time was this?
 A Frobably, it would have been in the neighborhood of around ten o'clock.
- Around ten o'clock?

A Yes, sir.

JUDGE HARRIS: When you left?

THE WITNESS: Yes.

Q Was the rest of the crew working, laying pipe?

A No.

- The only activity was this testing and digging for this conduit; is that correct?
 - 4. Yes, sir.
- Q At that time?
 - A Yes, sir.
- Did there come a time when you would have been informed on that date, that an inspection was being made and there was some difficulty?
 - A Yes, sir.
- ? How were you informed?
 - A I went to the field office, checked on some other business, and I was in the field office and I got word that there was some trouble with my crew, and I got into my truck and came back to Route 55 and there we were shut down.
- O Did you see Mr. Scott at that time?

 A I had seen a man there later and I found out it was Mr. Scott.
- What did you do when you first arrived at the scene of the operation at that time?

- A I crossed Route 55.
- Where did you park your car?

 A In sort of, the west end of the parking lot, at the fruit stand and market.
- Q What did you observe there? Was there an opening? A ditch?
 - A On the north side they had a slight ditch dug, yes.
- About how long was that ditch?
 A I would say the bottom length was approximately ten foot.
- Did you go over and observe the depth of the ditch and the consistency?
 - A Yes, I did.
- What did you see? What did you observe at that time?
 - Well, I looked in the trench and I see dirt. I didn't see nothing that they had. There was nothing, no conduit, no nothing.
- Q Had your men been looking for a conduit?

 A Yes, sir.
- Q How would they approach the actual work to be

done in this type of a situation?

A My procedure is I dig the hole down a foot, two foot, a man goes in and digs, and we call them banjos and maybe a foot or so down to see if you can locate anything, and we dig more with the hoe, and keep using that procedure down until you find it or whatever.

- When you said find it, you mean locate it?

 A Yes, sir.
- Q And nacessarily expose it?

A Not necessarily.

- When you arrived there, had you been informed whether or not the conduit had been located?

 A They had not been located.
- Q Did you see an exposed conduit at that time?

 A No.
- Was there anyone working inside of the trench at that time?

A At that time?

- Q Yes. When you arrived there.
 - A No, it was on the edge of the bank.
- Q Was the back hoe working?
 - A The back hoe was shut down waiting for me

- In other words, the operation was a standstill when you arrived; is that correct?
 - A Yes, sir.
- Was there any work done after you arrived there?
 - A Not digging.
- Q Did back-filling take place?
 - A After, later on that day, yes.
- Q Did you make any measurements of the depth of the trench at that time?
 - A. No. I didn't see no --
- Wait. Excuse me. Did you see a man whom you ultimately understood to be Mr. Scott, an OSHA Inspector, make any measurement at that time?
 - A To my --
- Q Did you see him?
 - A No.
- Q He didn't make any measurement in your presence while you were there; is that correct?
 - A No.

- So the first time you went over and inspected the actual trench, and after making this inspection, what did you do at that time after that?

 A I talked with my men, asked them what the problem was. They said that we got shut down, and I asked for what reason, and they told me an unsafe trench. I said, "Why?"

 And they said a man from OSHA said it was unsafe and not to proceed.
- Did he say why or how it was unsafe?
 A The banks were unsafe.
- Q Did he mention anything about depth at that time, if you recall?
 - A. Not just at that moment.
- Sometime later on he did?
 - 4. Yes.
- Q Did you have a procedure that any of your trench depths were greater than five feet?
 - 4. For safety purposes.
- Q And you had some shoring?
 - A Yes, sir.
- Q Was that on the site at that time?
 - A Yes, it was on the site.

- Q It was not used?
 - A It was not used.
- Did you have some further conversation with Mr. Scott to do anything with him? Will you tell the Court what you did?

A I believe Mr. Scott and I started talking, and I believe I can recollect, that
Mr. Scott and I measured or tried to measure
the depth of the trench, but I believe what
was used was a tape and not an engineer's rule.

- Not a folding rule?
 A I don't believe it was a folding rule.
- Q A steel tape?
 - A A steel tape or a cloth tape.
- Q Did anybody get down on the bottom of the hole?

 A No.
- Q Just dropped down?
 - A Right.
- Q What kind of a machine or back hoe was used at that time?
 - A Northwest hydraulic.
- Q Can you tell us the size of the bucket that was used?

- A A yard and a quarter.
- That was the cubic capacity of the bucket; is that correct?
 - A Yes.
- Q Did that bucket have a width?
 - A Yes, sir.
- Do you know what the width of that bucket was?
 - A Thirty-six inches.
- Q So that would mean if a bucket made a scoup, it would have to be at least thirty-six inches wide; is that correct?
 - A Yes.
- In your experience as a construction man,

 Mr. Schreppel, have you seen a thirty-six or
 a yard and a half machine with a thirty-six

 inch wide bucket dig in soft and unstable

 material?
 - A No, not in my life.
- Have you ever seen a ditch which was ninety degrees, a strand band trench without folding in?
 - A No.

- O Did you make some estimate as to the width of the trench that you observed at that time?

 A I would judge the bottom of the trench at the depth we were at to be at least three foot, and probably more than three foot.
- Q And did it slope up?
 - /. Yes.
- Q Did it back-slope?
 - A Yes.
- What was the width on top?

 A I would say five to eight feet.
- So to summarize, you had a trench, which you say is approximately fifteen feet long, about three foot on the bottom, and in width, and five feet at top?
 - A That would be pretty square.

JUDGE HARRIS: You say ten feet or fifteen feet?

THE WITNESS: On the bottom?

JUDGE HARRIS: The length of the bottom. I believe you said approximately ten foot.

At that time you did not see the top of the

con uit; is that correct?

A I did not, no.

Q Did you return with Mr. Scott to the field office?

A I met Mr. Scott in the field office.

Q You drove in different cars?

A I believe he drove in his own car.

- But you did get together in the field office?
 - A Yes, definitely.
- Q Did there come a time when he handed you a Citation?

A Yes.

Q Did the Citation request that there be an immediate compliance in closing of the trench to prevent the hazard?

A I can't answer positively.

Q Did there come a time on the 18th when the trench was closed up?

A Yes.

Q Were you there when it was done?
A Yes.

? That was up to ground level?

A Yes.

- O Did work progress on that particular area on the next day, on the 19th?
 - A Yes.
- And did you still have to locate the conduit prior to proceeding with the work?

 A Still have to, yes. We had to. I had located it before.
- So you located it the next day?

 A True.
- You couldn't continue without knowing where the conduit was?
 - A Right.
- Q Did you dig further down to reopen the same trench?
 - A Yes, sir.
- O Did you come to a point where you did locate the top of the box or the conduit itself?
 - A Yes, sir.
- Q Did you take a measurement of the depth of the trench at the point from the top of the conduit to the height of the bank of the road?

- A Yes, sir.
- Q How did you do this?

 A With a straight edge six foot rule.
- Q You have one, a stick?
 - A straight edge, a four by four straight piece of wood laying from bank to bank, a six foot rule from the top of the conduit like say indicating, to say, the bottom of the straight edge.
- And you recall what that depth was?

 A Yes, sir.
- Q What was that depth?

 Four and a half feet.
- Q Lid you have to make some tests to locate the depth of the conduit?
 - A Yes, sir.
- Q Did you locate the depth of the conduit?

 A Yes.
- Q What was the construction of this conduit?
 A Concrete.
- Q Concrete?
 - A Yes.
- O How wide was it on top, approximately?

- $\ensuremath{\mathbb{A}}$ Approximately eighteen inches across the top.
- Q Was there a reason for your having to determine how deep or the depth of this conduit was?

 A Yes.
- Q Will you explain to the Court what this purpose was?
 - A When there was -- the reason of either going under or over.
- Q With the main line pipe?
 A Yes, with the water main.
- Q Did you probe or how did you determine how far down it was?
 - A Standing on the cement conduit with a shovel.
- Q Hand shovel?
 - A Hand shovel digging approximately a footalong the edge of the conduit, taking a crowbar going down and we found out the conduit was laid on solid rock, which means that -- I don't know if I am --
- Q Go ahead.
 - Λ Which means, our water main comes off

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the top of the conduit.

- In fact, is that the way it was actually laid over the top of the conduit?
 - A Yes.
- Q Never underneath it?
 - L. No.
- Then after you passed that, you continued down with the rest of the work to the west of it?

 A Right.
- The first time that you saw that conduit,
 was that on June 19th, the day after the
 violation, or the alleged violation set forth
 here?
 - A. I believe that is the correct date.
- In other words, you did not see the conduit prior to the time that you were uncovered on June 19th, is that correct?
 - A Yes.
- O Did someone help you make that measurement at that time?
 - A Yes, sir.
- Q Was that? The Superintendent of the job?

- Q What is his name?
 - A. Robert Spencer.

MR. BALL: I think that is all.

JUDGE HARRIS: That was on June 19th?

MR. BALL: June 19th.

CROSS-EXAMINATION

BY MR. GOTSCH:

- Mr. Schreppel, where was the ditch located on June 13th with relationship to the access road to the power station? Where was it?

 Was it to the north of the access road, the middle, or the south?
 - 1. The 18th, is the day that I left.
- The day of the Citation. The day Mr. Scott was there.
 - A Facing north would be the left-hand corner of the driveway, mostly.
- Q Was it also into the driveway?
 A Into the driveway, yes.
- Q You stated that the ditch was about ten foot long?
 - A That was a guess. I didn't measure it.
- You didn't measure the length?

- A I am talking about the bottom length.
- The bottom length, that is right. Now, how much of the roadway obstructed your excavation on the 18th?
 - A The roadway leading to the power station?
- Q Right.
 - A Probably on that day. You are talking now, excuse me, the black top part of the road?
- Well, the black top road, the road that leads to the power station, the access road, how much of that was obstructed by your excavation on the 18th?
 - A I would say probably twenty, twenty-five foot, maybe thirty; somewhere roughly around that.
- That was due to the depth of the cut? The cut extended twenty-five feet?
 - /. Not due to the depth of the cut. I wouldn't say that.
- Q What other obstructions were there?
 - A No other obstructions. When you start to dig with a hoe, you don't drop the bucket

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right there. You might have to move back
a little more and cut your edges down, your
ends. The ends are different, but you
haven't got the depth of the full
length.

- Q The length of the cut again was how long on the 18th?
 - A. The bottom?
- Q Yes.
 - A I would --
- Q Let us say from the north end of the cut to the south end taking into account to have a slope, that both ends were sloped.
 - A I would judge somewhere in the neighborhood of five to eight foot. I didn't measure either, but I would say somewhere, pretty close to that, five to eight foot.
- Five to eight foot? You said the length was ten foot? What was the foot?

 Is that including the slope or the slope in addition?
 - A That would be from edge to edge, I would say.

- North edge to cut to the south edge?

 A That is right.
- Q How many feet was that?

 A The distance across, you are asking me?
- Q I am talking about the distance. From the distance, actually this would be east to west.

 A I was getting confused from north to south.
- Q Getting back to east and west. From the adge of the cut on one end to the edge on the other end, how long would that be?
 - A I would say probably twenty. You are talking, I am talking top now.
- Q Yes, top.
 - A Probably twenty to twenty-five, maybe.
- And the bottom at the deepest point was ten feet?
 - A Not at the deepest point, at its longest point.
- All right. At its longest point in the bottom, was that on the maximum depth of the ditch? Was it now level at this ten foot?
 - A As level as you can get it without taking

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a rake and raking it.

- And on the 18th could you have straddled the edge going from north to south?

 A I know for a positive fact that I could not. Maybe some could, but not me.
- On the 18th, would it be fair to say that
 the cut extended from a point from the middle
 of the access road to a point somewhat north
 of the access road; is that correct?

 Excuse me, that would be somewhat west of
 the access road, north of Route 55.

A The top of the cut?

- The center of the cut would have been where?
 Where would it have been located?
 A I would say just sort of visualizing that, I would say probably about five foot from the conduit.
- The conduit, which was ultimately located where in relationship to the access road?

 A As we found out later facing north, on the left-hand side of the driveway.
- Q How many feet west of the driveway was it?

 A I believe, I said, it was on the left-hand

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edge, west, facing west, of the driveway.

- So it was immediately on the left-hand side of the access road, is that correct, or was it?
 - A The conduit?
- Q Yes, the conduit.
 - A That was back probably five foot.
- Q Five foot back?
 - A In other words what I am saying,
 as we found out, the conduit, where we located it, I figure it was probably five foot
 dug each side of that. What I am trying to
 say that that part there --
- Q But the conduit was located how many feet to the left of the access road facing north?

 If you were standing on the access road facing north, how many feet of the acess road was the conduit?
 - A I would say it was on the corner of the access road. In fact, I know that is where it is.
- Q Were you present when Mr. Scott observed part of the north wall cave-in on the 18th?

- A I was there with Mr. Scott when the north wall, a small portion of it slid in.
- Did you observe the conduit before that portion of the north wall slid in?

 A I didn't observe it until I uncovered it on the 19th. I believe that is the correct
- ? Have you looked for the conduit before that
 - A We were in the process of doing that when we got involved with Mr. Scott.
- Q Mr. Schreppel, how wide was the conduit when you ultimately exposed it?
 - A I would say roughly eighteen inches.
- The eighteen inches now, is the depth?

 A I would say roughly as close as I can measure with a bar, guessing again, two foot.

 It had to be two foot, close to that, as I can guess.
- The depth of the conduit was two foot and it was eighteen inches across?
 - A Right.

date.

Q Mr. Schreppel, did you observe Mr. Scott and

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Mr. Seelman? Did you observe Mr. Seelman and

Mr. Scott with a wooden tape measure, measuring the depth of the excavation?

A If that happened, it happened before I

- got there.
- You did not observe Mr. Scott and Mr. Seelman with a wooden tape measure?
 - A No. That is something I don't understand anyway. I don't understand the wooden tape measure.
- Q Maybe you would call it an engineering rule, but I think we know what we mean by a wooden fold-out rule. You stated something about a cloth tape measure. Who produced the cloth tape measure?
 - A I didn't say this for one hundred per cent proof. I said I got a recollection of having a tape there. Whether this is, I believe, I can't say for sure.
- Q Did Mr. Scott -- you don't recall whether Mr. Scott brought out his cloth measure?
 - A I know I didn't have one.
- O Were you present on the 14th when Mr. Tompkins

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observed your trench?

A Yes, sir.

- What did Mr. Tompkins tell you at that time?

 A Well, he sort of told me that it was an unsafe trench and conditions were unsafe, and he put a tag on me, I believe that was on the 14th, not to proceed until the condition was corrected, which I did not.
- Q Did you back-fill the hole after Mr. Tompkins was there on the 14th?

A Yes, sir.

- Q Then you dug out the hole again on the 18th?

 A I did not dig out the hole on the 18th.
- Which day was the hole dug out again?

 A That was on the 20th.
- When was the ditch dug that Mr. Scott observed?
 - A That was on the Monday.
- You dug that hole on the 18th, a Monday?

 A You are getting me confused with the dates.
- I am not too interested in the 19th. I am interested in the 18th which was a Monday,

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the day Mr. Scott was there. When was that
hole exposed?

A The 18th.

Mr. Tompkins had left you on the 14th when you opened that hole?

A Of safety?

Q Yes.

A Yes, sir.

I also tried to run by safety.

- Q Did you lay back the slope to a proper angle for the soil conditions?
 - A Using my own judgment for the depth,

 . I would say, it was adequate.
- Q Had the hole been completely dug out when you were present on the job site or did work continue after you left that morning?
 - A They had been working on it, I believe he mentioned.
- Q When did you leave the job site on the 13th?
 A I would say somewhere around ten o'clock in the morning.
- Q You didn't come back until after Mr. Scott had

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arrived?

A That is true. I was at the field office when he arrived.

Q Did Mr. Seelman indicate to you that he had found the conduit?

A No.

You didn't make any measurement of the trench that Mr. Scott had observed? You immediately back-filled it?

A Not immediately, no.

Q Did you take any measurements before it was back-filled?

A I do not believe so.

Q So that is the only measurement that you took after another hole had been opened up on the 19th; is that correct?

A The same hole, but we located the conduit.

Q But --

A For the same location.

Q - - you don't know the exact location that Mr.
Seelman or Mr. Scott marked?

A I don't know.

Q Were you present when they measured with that

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ruler that Mr. Scott testified to?

A No, I was not. I just mentioned it, but if I can remember correctly, Mr. Scott had said that nothing changed from the time I measured that trench until the time I arrived. I had done nothing.

- Mow do you know locating the spot was the spot, was the same location that Mr. Scott measured on the 18th?
 - A I don't know.
- Q How do you know if you are not within several feet of it?
 - A There was on the pavement and still is there, a paint mark, Central Hudson Company mark locating that, where this has crossed the road. That is the one point that I went by. I know where he was, and I know where I was.
- Q How did you know where he was? Did he point out the spot he had measured?
 - A I could only be within the length of this --
- Q Did the north side slide in that same general

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area? You observed the north slide, did you not?

- A It did slide in when I stood with the gentleman.
- Was that the same area where Mr. Scott's measurement and your measurement was made on the following day?
 - In fact, I -- it might have been about that, give or take a foot.
- Q How do you identify a conduit once you have located it? Do you mark it? How do you locate it?
 - A We put markers. If we are not going to complete the project that day laying pipe over it, under it, we mark it.
- A If we are not going to finish the project this day?
- Q Right.
 - A We will back-fill it, if necessary.

 If it is in a dangerous spot, we will fence it, put barb wire around it. There are numerous things you can do.

On the 13th, did you mark the conduit?

A I don't know. How could I mark it?

I didn't see it.

to the north of the trench was --

- A I would say from the edge of the pavement
- How about the south side of the trench?

 JUDGE HARRIS: Let him answer it.

 You asked him a question.

THE WITNESS: You said south.

- Well, first of all the edge of the pavement to the south side of the trench, what was the distance there? the south side of the trench would be how close?
 - A That would be the south side.
- Q How many feet would that be?
 - 4. From what?
- What was the distance from the edge of the.
 pavement?
 - A You have me confused.
- Q The distance from the edge of the pavement of Route 55 to the south side of the trench.

- A I don't know how you would -- I got no idea. I don't know how you would measure it. The south edge of the trench is the pavement side.
- C That is right.
 - A So you are talking center to there or the edge of the trench. The edge of the trench is the edge of the pavement.
- Q So the south face of the excavation was up against the pavement?
 - A The pavement, eight inches of concrete.
- What was below the eight inches of concrete?
 A I didn't make no sample. It was the fill they used for road beds.
- You mentioned there was some blasting done in the area. Where was this blasting?
 - A East of where we are talking about.
- Was there any necessity to blast where you were?

 At the conduit we could not blast.
- That makes sense. What type of soil did you find adjacent to the conduit?
 - A Filtered.
- Q You made no measurement of the depth of the

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cut on the 18th before you left the job site;
is that correct?

A Not nearly. It was over two foot deep.

It was two feet deep when you left, but it
became deeper by the time Mr. Scott reached

A I would say a little bit.

You stated a conduit was laid on a solid rock.

What was the depth of the solid rock? How deep?

A I couldn't say. I said I hit the rock

with a bar. I didn't see the conduit, so I continued on, but it was solid rock next to that

conduit, but jabbing with a crowbar, I was

surmising that is solid rock, because we have

been hitting rock. I did not actually dig

down at the bottom of it and investigate to see

if it was solid rock.

Q I see.

Q

the site?

MR. GOTSCH: I have no further questions.

JUDGE HARRIS: Mr. Ball?

MR. BALL: I have no questions.

JUDGE HARRIS: Let me ask you a few

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things Mr. Schreppel.

EXAMINATION BY JUDGE HARRIS

When you left the ditch at ten o'clock in the morning, it was two feet deep. Now, when you discovered the conduit the following day, was that excavation located on the same spot of the excavation which you left at ten o'clock on the 18th?

A I would say as closely as I could, just a matter of two to three to four feet, give or take this way.

(Indicating with his hands.)

- Q North and south?
 - A It would be right in that same spot.
- You say you back-filled?
 - A That hole that was opened up when Scott was there.
- Why was that back-filled?
 - A. It was on the shoulder of Route 55. It was a danger spot for the Central Hudson.

(Discussion off the record.)

I thought you said that a scale or a cloth tape
had been used to measure the depth of the hole

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when Scott was present, not a folding rule,

did you say that?

- A I said I figured that I could remember something about it, but it was either a tape or steel or cloth tape that I got in my mind. It was not a folding rule. It was not an engineer's rule.
- Did you participate with Scott in measuring the depth?
 - A No, I got something I can't remember the whole thing, but it is something that I got, a memory of that tape was used, not an engineer's ruler.
- Your recollection is that some measuring was carrying on.
 - A When we returned.
- When you came back and found Scott from the field office you had then telephoned and work had been stopped?
 - A Yes.

(The witness was excused.)

(The hearing recessed from 2:10 P.M.

to 2:15 P. M.)

JUDGE HARRIS: We will now hear the next witness.

Thereupon,

RCBERT A. SPENCER,

of 9 Lewis Avenue, Cohoes, New York, was duly called as a witness for and in behalf of the Respondent, and being then and there duly sworn by Judge Harris, assumed the witness stand, and upon examination, testified as follows:

DIRECT EXAMINATION

BY MR. BALL:

- Q Where do you reside?
 - A 9 Lewis Avenue, Cohoes, New York.
- Q What is your employment?
 - A Olin Construction Company.
- In what capacity are you employed?
 - A Superintendent.
- Q How long have you been with the Olin Company?
 - A Approximately four and a half years.
- What was your business experience prior to that time, Mr. Spencer?
 - A Three years experience in the construction field with consultant engineering firms.

- Q Prior to that time?
 - A College.
- Q Does this include underground construction?

 A Yes, sir.
- Q Do you have any experience prior to working with Olin?
 - A Yes.
- Working with consulting engineers?
 A Working in an inspection capacity and
 - some design.
- You have some engineering background?
 - A Yes.
- Q A degree?
 - A No.
- Q Do you have some relationship with the job
 that was being conducted by Olin in Foughkeepsie,
 New York during 1973?
 - A Yes, sir. I was the Superintendent.
- Q Of the entire job?
 - A Yes.
- What did the job consist of?
 4.
 A Approximately sixty lineal feet.
- Q Of what?

- A Water main pipe.
- Q Twelve inch?
 - A Twelve and eight inch.
- This includes a main line and a house lateral?

 A Yes.
- Q Were you the Superintendent in charge of this job in the month of June, 1973?
 A Yes, I was.
- When did you first learn, Mr. Spencer, about the difficulties with OSHA that took place on or about June 18th, 1973, in connection with this job?
 - A the close of work on June 18, around 4:30 in the afternoon.
- Were you prior to that time in the city?
 A No, I was not.
- Q Out of town on other business; is that correct?

 A Yes.
- When you came back into the city or into
 Foughkeepsie, did you find out there that there
 were some difficulty with OSHA at that time?
 - A I called in in the afternoon at the close of business to check on the job prior to my absence,

and was informed at that time.

Were you not present at any of the proceedings that took place on the 18th with Mr. Scott or you had no personal observations of what took place at that time; is that correct?

A That is correct.

- Q Did you know what work was to be done on June 18th, as Superintendent on the job?
 - A Yes.
- Q What was the work you had required your crew to be done around the site of Route 55 near the substation?
 - A They had been directed to dig a test hole and locate the underground power conduit.
- Was this something that was required for the progress of the job?

A Yes.

- And any particular crew in charge of this particular operation?
 - A Yes.
- Q And who was the foreman of that crew?
 - A Mr. Schreppel.
- Q Did you get a report of the progress trying to

locate the underground conduit on June 18th, or June 19th?

- A I got a progress report via the telephone.
- That was a 4:30 telephone conversation?

 A On the 18th.
- Were you informed at that time that the conduit had been located and the work would be in progress?

 A No.
- When did you return to the job site?

 A The morning of the 19th.
- Did you make some effort -- was there some
 effort being made to continue the job on Route 55
 for the location of this electrical conduit?
 - I directed that they resume.
- O Did you actually visit the site yourself?

 A Yes.
- Were you there prior to any digging taking place at the site?
 - A On the 19th:
- At the start of digging on the 19th?

 A Yes.
- Can you tell me what took place on the 19th when you were there?

- On the 19th I arrived at the same time as the crew and they proceeded to excavate, to look for the cable.
- Was this location the assumed location?
 A Yes.
- But the exact location was not determined?

 A Central Hudson had located the alignment of the conduit by making a paint mark on the road.
- That was located by some device?

 A It is located by some electronic finder.
- Am I correct in understanding that the lateral or the lineal side where the conduit ran was known? That it was a question of the depth of the conduit that had to be determined?
 - A That is correct.
- So you knew pretty well where the conduit was located but didn't know how deep that was?

 That was the problem you had to solve?

 A That is correct.
- Would you tell the Court what happened on the 19th as the work progressed, after the work, by the crews that day when the actual conduit was

located?

- A Well, we resumed digging at the site, looking for the conduit.
- The ditch had been back-filled?

 A The ground was level, two inches had been back-filled, and we started to dig again, using the same procedure Mr. Schreppel outlined before using the back hoe to take off the first foot or two feet, and they dug with hand shovels, and we didn't find it. We took and we dug another foot until we found it.
- You used a crowbar?
 - A Yes.
- Q Did there come a point where you did locate the top of the conduit?
 - A Yes, we did.
- Q In view of the Citation which had been served upon you, did you take some action to determine the depth of that conduit on the road level?

 A Yes.
 - Would you describe to the Court what you did
 - at that time?
 - After we located the top of the conduit, we

took a four by four board, straight, and laid it across the top of the trench from one side to the other, took a six foot rule and measured down from the bottom of the four by four to the top of the conduit.

Do you know what the measurement was to the bottom of that four by four from the top of the conduit?

A. Yes.

Q What was that?

A Four and a half feet.

- Q Did you take some pictures at that time?

 A Yes, I did.
- Q of the measurements?

A I took pictures, the measurement, proceedings, yes.

JUDGE HARRIS: R-1 and R-2 are to be marked for identification.

(Two photographs -- marked individually R-1 and R-2 for Identification, as of this date.)

I show you a photograph marked R-1 for Identification and ask you f you know what this is?

- Yes, I do.
- Did you take this? Do you know who took the actual photograph?
 - E I took the photograph.
- Q Can you tell the Court what this photograph represents?
 - A The photograph is looking at a southerly direction across Route 55 with the trench in the foreground, showing a picture of Mr. Schreppel holding the four by four and the six foot rule to measure the depth of the trench from the ground surface to the top of the conduit.
- You are at the westerly side of the trench looking easterly, roughly along?

JUDGE HARRIS: Show it to Mr. Gotsch.

(Mr. Ball showed the exhibits to Mr. Gotsch.)

MR. GOTSCH: Your Honor, the only question I have about this is I would like to have copies of these for our records.

JUDGE HARRIS: Can you supply them,
Mr. Ball?

MR. BALL: I will supply them to
Mr. Gotsch and to the Court. I will have
copies for you.

JUDGE HARRIS: They will be supplied to you.

Q I show you Exhibit marked R-2 and ask you what that is, Mr. Spencer?

A That is a photograph of the same area looking in a westerly direction, and again looking at Mr. Schreppel with a four by four and a six foot rule, measuring the depth from the ground level to the top of the conduit.

- Q Who took this photograph?
 - A I took this photograph.
- [I offer both of them in evidence.

MR. GOTSCH: I have no objection, except for the fact that certainly I hope, we receive copies of those photographs.

JUDGE HARRIS: They will be supplied to you.

Both photographs will be received in

(Two photographs -- received and marked in Evidence as R-1 and R-2, respectively as of this date.)

- I believe you previously testified that the distance as shown upon the engineer's rule, from the top of the conduit to the bottom of the four by four was four and a half feet; is that correct?
 - A That is correct.
- Q In both pictures?
 - A That is correct.

JUDGE HARRIS: Actually there are two different views of the same result.

THE WITNESS: That is correct. The two views were taken to establish its location.

JUDGE HARRIS: In opposite directions?

THE WITNESS: Yes, sir, so the structures there are permanent.

JUDGE HARRIS: May I see them?

After the conduit was located, Mr. Spencer, did

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the work progress then in the laying of the water line through the area?

- A Yes, sir.
- When the water line was actually laid through the area where the conduit was, was this laid over or under the conduit?
 - A It was laid over the conduit.
- Then did work progress to the westerly direction according to the fulfilling of the contract beyond that point; is that correct?
 - A That is correct.
- Was the work substantially done with this contract?
 - A That is correct.

By the company?

- Mr. Spencer, are there safety rules that are promulgated by the company? Had there been safety rules promulgated by the company in the carrying out of the construction work, particularly of the trenching and any specific directions given to the employees as to the method of the observation of the safety rules?
- Q By the company.

- A Yes.
- Were there any rules in connection with the compliance with the safety standards as established by the OSHA laws?

A Yes.

- Do you, as Superintendent, take steps to see that your men observe these various regulations both in the company and of OSHA?
 - A Yes, sir.
- Q Is it your intention as Superintendent to see if these are carried out?

A Yes.

- Where you had trenches which were over five foot in depth, you know these were to be shored or the banks laid down to a safe angle?

 A. Yes.
- Q Was it your instruction to your men as Superintendent that these be observed?
 - 4. Yes.
- Q And with the proper equipment provided by the company for that purpose?
 - 4. Yes.
- Q Was there such equipment available on this job

on the 13th and 19th of June, 1973?

A Yes.

MR. BALL: I have no further questions.

CROSS-EXAMINATION

BY MR. GOTSCH:

- Mr. Spencer, did you use an electronic finder in order to find the location of this conduit?

 A No, we do not. But the Central Hudson used it --
- The Central Hudson, they had marked the location by use of their finder?
 - A That is correct.
- You didn't have one yourself?

 A That is correct.
- We have -- I noticed your photographs, two of the 19th, where youwere present. You weren't present on the 18th?
 - A That is correct.
- Were you present on the 14th when Mr. Tompkins came to your job site, from the New York State
 Department of Labor?
 - A Yes.

- Q Did Mr. Tompkins speak to you at that time?

 A I don't recall whether I spoke to Mr.

 Tompkins that day or not.
- Is the conduit shown in this photograph the only underground conduit that was located in that area?
 - The only one in this general area were -it is the only conduit in this general area.
- Were there any telephone cables located in this general vicinity on this side of the street?
- No, not on this side of the street.

 So you unearthed no other wires or cables at approximately at the same time that you unearthed this conduit? This is R-1. This is the same conduit shown? Are there any other wires or any other types of unnatural equipment that wouldn't normally be found in here uncovered at this end?
 - A No, the conduit is the only thing.
- I notice the size of this piece of plywood found in this hole.
 - A It is a four by eight sheet.

And this is Respondent's R-1. How much exposure of the four by eight above the surface is in the excavation? Suppose you estimate, looking at that photograph, how many inches?

JUDGE HARRIS: The photograph speaks for itself.

A All right. I would guess approximately eighteen inches.

So, at this part of the excavation, you apparently have a depth of some six and a half feet, taking into account the four by eight piece of plywood?

MR. BALL: I am going to have to object to the assumption of counsel. He is talking about a perpendicular as on a bias.

MR. GOTSCH: I will rephrase that question.

Would this part of the excavation be somewhat deeper where Mr. Schreppel is standing, the area immediately adjacent to this four by eight piece of plywood?

JUDGE HARRIS: Behind the man, behind

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Mr. Schreppel.

A All right. I would say it is 1 ar

- Q How much lower?
 - A I have no way of telling from the photograph.
- Q Knowing what is unearthed in this area, is that correct?
 - A This would be somewhat in the vicinity --
- I'll ask you again if anything had been unearthed in the vicinity of this four by eight piece of plywood?

JUDGE HARRIS: In R-1.

MR. GOTSCH: In R-1.

A All right. What do you mean by anything?

Well, something along the lines of another pipe or cable of some sort.

A No.

You were not present on the 13th when they started back hoeing and excavating in order to find the conduit? Which day did you begin that work?

- A On the 18th.
- Q Did you observe the Central power marker in this photograph?
 - A There is a paint mark in the road.
- Q You weren't present on the 13th?
 - A That is correct.
- You have no idea if your men had dug down at this exact spot on the 18th?
 - I wasn't present, so I don't know.

 The only thing they had to go by was the paint mark and they are accurate to a foot or two.
- Youdon't know whether your crew was able to find the conduit on the 18th?
 - A The report that I got at the close of work on the 18th, was that they had not yet found it.
- When you arrived at the scene on the 19th,
 was there any marker of any description in
 the ground in the vicinity of where they had
 back-filled the night before?
 - A No, there was not.
- Q There was no marker on the 19th?

- A The only marker is the paint one on the street on Route 55.
- Mr. Spencer, how would you characterize the soil that is shown in Exhibit R-1 and R-2?

 A It is fill material.
- This is the Mighway 55? And Route 55 that is shown immediately adjacent to the excavation?
 - . That is correct.

JUDGE HARRIS: Pointing to R-1.

Pointing to R-1. But you cannot testify as to the identity of the location shown in R-1 and R-2, shown by Mr. Schreppel with the location of Mr. Scott which had been marked the previous day

JUDGE HARRIS: Do you understand that?

A All right. I cannot positively identify it. The only comment is, they had the same mark each time. The only comment I have is, that they had the same mark in the road to go by each time the hole was dug up.

Can you explain how it was that your crew did not find the conduit on the 18th if they were using

the same marker?

- A Mr. Scott appeared before they got to the depth where the conduit exists.
- What would be the reason that, looking at this, that you would have to go deeper than the depth of the conduit in order to dig this trench?
 - A In the picture, in the left-hand extremity of the picture where you see the four by eight sheet of plywood is the end of the last pipe, and that was laid on June 14th. Not knowing the depth in which the conduit lay, there are two distances between the end of that pipe and the conduit. That pipe had to be brought up from there over the conduit.
- Was the pipe back-filled between the 14th and the 18th, or was this left that way?
 - A It was back-filled the 14th. The entire area of the picture was levelled.
- So Mr. Scott came upon the scene --
 - The area between the edge of the pipe and the conduit had not been excavated prior to the 19th, excavated before the 19th.

The end of the pipe had not been excavated

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before the 19th?

The 14th, that last pipe was laid and it was back-filled on the 13th and the test hole was dug over the conduit. The back-fill on the 19th was reopened again, and once the conduit was found, we went back and dug from the back of the conduit. That hole may have been a few feet in advance of the pipe because it has to be dug out. The hole may have been dug a few feet on the end of the pipe to facilitate getting to the pipe in the ground.

I notice some writings on the back of the Exhibit R-1 and R-2.

MR. BALL: We are not offering that.

JUDGE HARRIS: The writing on both sides
of the exhibits are not being offered.

- Just for the record, Mr. Spencer, where was the access road located? Where did the access road cross this excavation, if you know?
- A This is in R-1. It isn't shown in that picture. The access road, the west end of it would be slightly outside the picture on the bottom of the picture outside of the conduit.

JUDGE HARRIS: On the near side of the road?

THE WITNESS: Yes, and the other side of the driveway would be up in the picture farther, but I can't say where in the picture. I was standing somewhere near the drive.

- The conduit was located at the west end of the access road?
 - A That is right.
- So the access road was stretched east of the conduit?
 - A Right.
- The area of the four by eight, would that be the other end of the access road? You said you had pipe laid up to that point. Is that the access road?
 - A The pipe is laid up to the point shown in the picture. I made no reference to where the end of the pipe is in with respect to the driveway, and I cannot tell from the picture how far it is from the conduit to the end of that pipe.

MR. GOTSCH: I have no further questions.

REDIRECT EXAMINATION

BY MR. BALL:

- Reference was made to that piece of plywood shown in R-1, I believe. You made mention of four by eight. Was that the original size of the plywood?
 - A That is correct.
- Were the sheets cut from time to time to fit various sizes or did they always remain as four by eight, the same size?
 - Λ They were occasionally cut.
- Q Can you tell us whether or not the piece of plywood shown in the Exhibit R-1 was full size or not?
 - A I cannot tell from the picture, no.
- A question was asked about the consistency of the bank in the photographs. To your knowledge of underground construction or in your experience, Mr. Spencer, knowing the type of equipment that was used for the back hoe for digging in this particular situation,

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is it your experience that a ninety degree
straight line cut could be made with a back
hoe in this soil?

- A No, not in a fill condition.
- There would have to be some slope or it would not stay at a ninety degree angle; is that correct?
 - A That is correct.
- Was there a particular concern about the location of this particular underground obstruction, which is different than other underground or other underground construction that you had in the job?
 - In what respect?
- Do you have to take special care with this particular location, with this particular conduit?
 - A We were taking special care with respect to the fact that the Central Hudson Company would not tell us if there was a case in the concrete or a sleeve of some type or just a bare cable right next to the power station.

 Certainly, the risk is very great if it happened

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to be a bare cable or main cable.

Was this a way of explaining the extreme care and the caution which you took to locate the depth of this conduit?

A It has nothing to do with it. We used the same procedure to find any ground obstruction, particularly cables.

MR. BALL: I have no further questions.

RECROSS EXAMINATION

BY MR. GOTSCH:

Earlier we heard testimony that the day of the 18th had been a rainy day. The fact that we had damp soil conditions, would that have made a difference in the consistency of the cut and the manner in how it was done?

It would not have made any difference.

The rain would not have penetrated that far.

You have to have a lot of rain to penetrate

more than a few inches in the ground to make

the soil condition that you are speaking of.

However, if you had a condition where your crew was digging in the rain, it would tend to

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lead to a greater angle of slope after a
back hoe had cut out the excavation?

JUDGE HARRIS: There is no testimony that any digging was done here that day.

- Well, assuming for argument sake, the damp conditions, how far would it have \$0.000 make a difference in the type of cut of a back hoe? would that make a difference?
 - A Only in the surface layer.

MR. GOTSCH: I have no further questions.

JUDGE HARRIS: Thank you.
Anything further, Mr. Ball?

MR. BALL: We will rest.

MR. GOTSCH: I want to ask Mr. Scott to come back, particularly in light of the photographs that have been introduced.

Thereupon,

EDWARD SCOTT,

was duly recalled as a witness and reminded that he was still under oath, and upon examination, testified as follows:

JUDGE HARRIS: Continue under the same

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order. The oath had already been administered.

REDIRECT EXAMINATION

BY MR. GOTSCH:

- I show you Exhibits R-1 and R-2, Mr. Scott.

 Did you observe the conduit that Mr. Schreppel
 is standing on on the date of your inspection?
 - A Possibly the corner of it. I can't identify it. It wasn't completely unearthed but this appears to be the type of composition that has a smooth brown surface, and it looked to me like a ceramic.
- Q Did you observe into the extent that it is uncovered in this photograph?
 - A Definitely not. The cut was nowhere near it as it is in this photograph.
- Q In this location where Mr. Schreppel is standing, was that the same location that you measured on the 18th?
 - A I couldn't say. Looking at those photographs, I couldn't say.
- Did you measure the conduit on the 18th?

 To the side of the conduit is where the measurement was taken.

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Looking at R-1.

A Can I explain? I saw the top of the conduit.

JUDGE HARRIS: The corner nearest you?

THE WITNESS: Nearest Schreppel.

It was partially cleared, partially covered with dirt, and it appeared to be a brown ceramic type material. The cut was made below it, and it was identified by the men as the conduit and the measurement was made directly after, where Mr. Schreppel was standing. The trench was much narrower than is shown in the picture, and the tape was held by Mr. Seelman.

JUDGE HARRIS: At the time the measurement was made, however, the two by four had not been laid across?

THE WITNESS: The only piece of wood that I saw in that area, and I am talking about this around, behind the machinery, not doing a thorouga investigation, but looking around, was a stake that was used before I

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left on the instruction of Mr. Schreppel,
and while I was driving it away, Mr.

Pottinger was holding that stake, and
the machinery had started up, and they
started to back-fill. They were under
orders to back-fill.

JUDGE HARRIS: About what time was that?

THE WITNESS: This is when we left, some time around a quarter to three and three; the exact time I cannot say.

JUDGE HARRIS: At that time you said,
I think, a corner of the conduit had been
exposed?

THE WITNESS: Yes.

JUDGE HARRIS: Had they proceeded to cover the hole before half past three that afternoon?

THE WITNESS: I would say a little before three.

The point in the excavation -- was that even with the top of the conduit or was it -- below it? This photo was after the conduit, and

Minutes of Hearing, dated 9-25-73. Edward Scott, recalled for Complainant, Redirect. 136 down the side of the conduit?

JUDGE HARRIS: Lehind the point where Mr. Schreppel was standing. This is R-1.

- So the excavation on the 18th had a depth greater than the top of the conduit?
 - A Definitely.
- Mr. Scott, you further stated you saw someone mark the conduit on the 18th?
 - A Mr. Pottinger was holding a stake in the area of the conduit as I was driving away. I followed Mr. Seelman, and Mr. Schreppel followed me. Three vehicles were involved in the departure.
- So the excavation as portrayed in R-1 and R-2 has very little resemblance to the scene you observed on the 18th?
 - A I would say that.

JUDGE HARRIS: You say it has no resemblance?

THE WITNESS: The width from what

I can see in the picture takes it out of
the area of the violation.

JUDGE HARRIS: You don't recognize it?

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You don't recognize the hole as you see it
in the photographs, do you?

THE WITNESS: No. I recognize the area in relation to the surrounding land-marks, but the size of the hole is definitely not the same.

- Mr. Scott, was there any occasion on the 13th
 where a tape measure or a cloth tape measure or
 a metal tape measure was used to measure that hole?

 A Not in my presence.
- And the only measurement made was with a wooden foldable ruler; is that correct?
 - A. Yes.

MR. GCTSCH: I have no further questions.

RECROSS-EXAMINATION

BY MR. DALL:

- Mr. Scott, did you observe a blue line on the State Highway -- paint -- that would have some indication as to the location of the conduit?

 A No.
- You didn't see anything near the area where you made your observation?

- A I didn't look.
- You didn't look and didn't see it?

 A That is right.
- I show you both R-1 and R-2, and does that represent a type of soil that you saw when you were there?
 - A Yes, it does.
- And that is the type of soil which you determined to be dangerous and created a dangerous condition; is that correct?
 - A Yes. You see, it's starting to slip here.
- It does represent for the Court an idea of what kind of fill it is and the kind of fill that the straight side is to a ninety degree angle; is that corre 2?

JUDGE HARRIS: That has been covered.

- You made a measurement with Mr. Seelman; is that correct?
 - A Right.
- You were on the road side and Mr. Seelman was on the north bank, am I correct, when the measurement was made?
 - A Correct.

- And as I understand your testimony on redirect, the measure was put down alongside of what you thought was a conduit or what you determined to be a conduit at that time; is that correct?

 A. Yes.
- As I understand it, you knelt down on the roadside and eye-balled across to see what the area w ?

A That is correct.

- Or what the depth was; is that correct? And Mr. Seelman was on the other side holding the ruler, and he had it put down; is that correct?
 - 1. That is correct.
- And he was holding it with his fist and he had it down into the hole; is that correct?

 And you looked across and saw seventy-two inches?

 A Yes.
- Was he holding the ruler like this or with his fist?

(Indicating)

A I asked him to hold it on the bottom.

I didn't observe his hand or observe the reading.

I wasn't watching the hand.

- And you saw seventy-two inches?

 A Yes.
- And did you see something that appeared to

 Le a conduit below in the bottom of the trench?

 A Yes.
- There was a little hole around where the ruler went into the side of the conduit; is that correct?

A Yes.

- And there was just a little hole around where the ruler went into the side of the conduit; is that correct?
 - A Yes. It was the depth. I made a horizontal and sweeping motion. There were two men in the trench and it started sleping up to the end.
- Did you put it ---
 - A Maybe four feet constant depth in that area where they had been.

JUDGE HARRIS: Four feet of the bottom of the trench, was it fairly level?

THE WITNESS: And then it sloped up.

They were digging when you arrived there?

- A I couldn't see into the trench. I couldn't.
- They were shovelling holes around the conduit?
 - A They had shovelled when they came out.
- Wherever you put that ruler, that was the deepest part where the trench was; is that correct?

A Yes.

- As far as you know, it may have been lower than the top of the conduit?
 - A It was lower.
- It was lower than the top of the conduit?

 A Yes.

MR. BALL: I have no further questions.

JUDGE HARRIS: Anything further,

Mr. Gotsch?

MR. GOTSCH: No, Your Honor.

JUDGE HARRIS: Thank you, Mr. Scott.

(Witness was excused.)

JUDGE HARRIS: Any additional rebuttal,

Mr. Gotsch?

MR. GOTSCH: No, Your Honor, no further rebuttal witnesses.

JUDGE HARRIS: Something you want to

add, Mr. Ball?

MR. BALL: May I have Mr. Spencer recalled to the stand for one minute. Thereupon,

ROBERT A. SPENCER,

was duly recalled as a witness and reminded that he was still under oath, and upon examination, testified as follows:

JUDGE HARRIS: Continue with the same oath.

REDIRECT EXAMINATION

BY MR. BALL:

- Mr. Spencer, I refer you to both R-1 and R-2 and ask you what kind of a measure is being used to determine the depth?
 - A Six foot wooden rule.
- You say six foot wooden rule; that is seventytwo inches; is that correct?
 - A That is correct.
- In inches, counted up in inches, and then mark it off in feet, from zero to seventy-two inches.

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Robert A. Spencer for Respondent, Recross.

- If you take the top of your hand, and put it across here, that will cover the numeral seventy-
 - . It should, yes.

MR. BALL: That is all.

RECROSS-EXAMINATION

BY MR. GOTSCH:

- ? Mr. Spencer, have you seen any of these rulers graded at seventy-two inches?
 - 4. Yes.

JUDGE HARRIS: That is not the point.

We are talking about this particular ruler.

IR. GOTSCH: Yes, sir.

This particular ruler, which is on the 19th,
but there is no testimony that that was the

ruler that was used on the 19th.

JUDGE HARRIS: No, no.

MR. GOTSCH: I don't know if this is in the record, but this was the hand delivered Citation. It sets forth --

MR. BALL: I have a copy of it.

JUDGE HARRIS: Service admitted.

MR. BALL: We received it.

MR. GOTSCH: I would if it is not already

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part of the record, I would like to make sure that it is entered into the record.

JUDGE HARRIS: Why don't you mark it

MR. BALL: I have no objection.

MR. GOTSCH: I offer the exhibit which speaks for itself. It is a receipt of Mr. Scott who gave it to Mr. Schreppel on June 18th for a hand-delivered Citation, signed by Mr. Schreppel.

JUDGE HARRIS: No objection by Mr. Ball.

(Document shown to Mr. Schreppel.)

MR. BALL: No objection.

(Document -- received and marked as Complainant's Exhibit 0-1 for Identification and in Evidence, as of this date.)

MR. GOTSCH: I have no further questions.

JUDGE HARRIS: Doth sides rest.

You may be excused.

Either side would like to make aclosing statement,

MR. BALL: May it please the Court, I

Minutes of Hearing, dated 9-25-73. Closing Statement by Mr. Ball. renew my motion for dismissal on the ground that the evidence presented by the Complainant does not show a violation occurring on June 18th, 1973 as as alleged in the complaint herein. The Respondent's witnesses are such that show that it is established that the depth of the trench at the time of the alleged violation could not have been more than four and one-half feet, and that is the measurement know the top of the conduit which was exposed on the subsequent day. The conduit could not actually be reached and arrived at prior to that time. There was a line which indicated where the conduit was to be located and the only problem was the depth, not the actual location, but the depth at which the conduit existed. When that was excavated on the following day, it was four and a half feet from the top of the road. That was the maximum amount of the excavation. It wasn't even a serious violation there, and there was no positive testimony that the men were

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working at the depth lower than four and one-half feet, as is the testimony of Mr. Scott that the measurement was taken which showed that one of the places where he thought the conduit was, that went below, more than five feet, but in fact, as he looked across the line that was established by a man who was holding a ruler, he saw the figure seventy-two inches and, therefore, he judged that the depth of the trench was six feet. It has been testified by competent, experienced people in the construction business, which incidentally Mr. Scott has not had that . . amount of experience, that you cannot in this type of soil, where it was in filled ground, that you cannot get a ninety degree slope, which means, basically, that a back hoe was cutting and just digging and digging it out of the three and a half, or three feet, and the back hoe would stay in filled soil. The experience of the testimony of the witnesses have mentioned that this Minutes of Hearing, dated 9-25-73.
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will not happen, and it had to be wider than the three feet or three and a half feet, and, in fact, it was.

Mr. Scott is a tall man, and I don't know how far his straddle is. Mr. Schreppel's testimony of five to eight feet is being wide—and—in addition to that, this was not worked in the sense of the on-going pipe line where there were men constantly at work, and there was an experiment of a test hole to locate a particular situation, and this is in compliance with the OSHA regulations. We have to make these tests prior to making, conducting the work, and that is what the employer was doing.

JUDGE HARRIS: You contend that a test hole need not be shored, no matter what happens?

MR. BALL: I do say, that in compliance and carrying out the directions and safety standards of OSHA, I would say if you have a test hole, of course it should be shored.

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It isn't the same safety hazard that you have in the main line trench where men are working just in laying a pipe, and you don't have a lot of men around. You don't have men in the hole. I don't think this is serious; that this is a violation wless

it was regular work in over a: ...

five foot hole in a trench where the
general crew was working, and you had a
number of men working in the trench.

JUDGE HARRIS: Assuming, Mr. Ball, that a procedure is followed as described by Mr. Spencer. The back hoe took up two feet, and then men were sent to the ditch, and they took out another foot, and they did not use the back hoe, and took out another foot. The men were sent in to shovel.

Now, if they carried that excavation down below five feet, excit that procedure was followed, the standard required that shoring or sloping was to be used.

MR. BALL: I would agree, but to my mind, there is a difference where you have an

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on-going main line trench which is consistent and I think, it is more a controllable situation than in just laying a pipe consistently.

JUDGE HARRIS: I might add in passing someone had to do the digging. Consequently, that hole was being dug and men had to be sent down.

MR. PALL: Someone had to be doing the probing. I think this is for a momentary situation. That is true, but I do think, there was no testimony which is required under the regulations and I think our proof showed that, Your Honor.

MR. GOTSCH: We have here a situation where a compliance of fear came upon a trench. A trench, by the way, is defined in the standards in 1926.650. A trench is defined as a narrow excavation made below the surface of the ground, and it goes on, but the width of a trench is not greater than fifteen feet. I don't think we can have any dispute over the fact that the excavation

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that Mr. Scott saw fell into the definition of a trench. Mr. Scott made the only measurement on June 18th and his calculations set the depth of that trench at six foot. I don't think that the evidence presented or the measurements made on June 18th is convincing. They did not measure the exact location, and Mr. Scott was at the depth of the trench on the 18th, near the conduit which was greater than that shown in the Respondent's exhibit on the following day.

JUDGE HARRIS: I recall the testimony that the conduit uncovered on the 19th was four and a half feet, below the surface of the road. Mr. Scott testified that it was the day before he covered that corner of this conduit which was exposed, and measurement was made at that point.

MR. GOTSCH: It was made adjacent
to the conduit. I believe Mr. Scott further
stated that it was to the bottom of the
trench which was somewhat deeper than the
exposed point of the conduit. I think

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Mr. Scott testified, and the only testimony is to the credible evidence of the depth of the hole on the date of the Citation. Respondent made no mention before they back-filled the only hole on the 10th, and, in fact, their principal witnesses were not even present during the greater part of Mr. Scott's inspection, at which time he took the measurement. The soil was back-filled, the general requirements specify trenching requirements and that states that additional proportions by way of shoring and bracing shall be taken to prevent cave-ins when excavation or trenches are made in locations adjacent to back-fill excavations or where excavations are subjected to vibration or railroad or highway traffic, the operational machinery or any other source. The situation that Mr. Scott observed was an excavation made in a location adjacent to a back-filled excavation, next to the highway, and also adjacent to the previously dug excavations that were

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back-filled, and the highway, of course,
as the Respondent showed in exhibits,

that it was immediately adjacent to this excavation, and of course the back how machinery was also operating in the area. All of the elements that would cause unstable soil to act in a greater and unstable manner were present. In fact, Mr. Scott observed a small slide while he was conducting his closing conference with several Respondent's employees. There can be no doubt that this soil was unstable, and in fact, was compounded by the various factors that were present in this action.

JUDGE HARRIS: It is admittedly by the Respondent's witness that testified that it was fill.

MR. GOTSCH: Mr. Scott observed an angle that was vertically cut, which would be approximately a ninety degree angle, and Mr. Tompkins who had been on the scene previously, had also observed vertical cuts made by the same Respondent in the

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adjacent area. The Respondent admitted
that no shoring or trenching or sloring
was provided, and I would submit that
most of the evidence presented by the
Respondent was not germane to the inspection
made by Mr. Scott. For that reason, I would
ask that the Citation and proposed penalties
as delivered by Mr. Scott be affirmed as a
final order of the Occupational and Safety
Review Commission.

JUDGE HARRIS: There is a sharp conflict in your testimony. I cannot determine this at this juncture, and I am going to take both your applications under advisement and I will ask you to file proposals of fact and conclusions of law. How much time do you require? The rules permit twenty days.

MR. BALL: I would appreciate the full time.

MR. GOTSCH: This would be twenty days after the receipt of the transcript.

JUDGE HARRIS: Does your company send copies to the individuals, the Complainant

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and the Respondents, upon request, Mr. Swiss?

THE REFORTER: They will be provided.

MR. ALL: I want one, too.

JUDGE HARRIS: I will order each, to receive a copy of the transcript, an original, and remaining three copies or two copies to me, and I will allow twenty days after receipt of the transcript.

You each have five days thereafter to answer your opponent's findings, if you so desire.

If there is nothing further, we stand adjourned.

(The hearing adjourned at 3:30 P.M.)

* *

I hereby certify that the foregoing is a true and accurate transcript of the testimony taken at this hearing.

Harold Swiss, Hearing Reporter

RESPONDENT'S EXHIBITS R-1 and R-2 - Photographs.

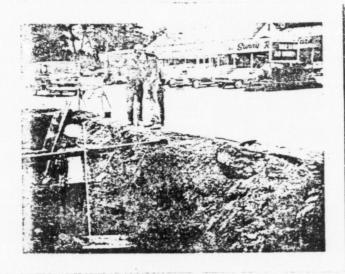


Exhibit "RI"

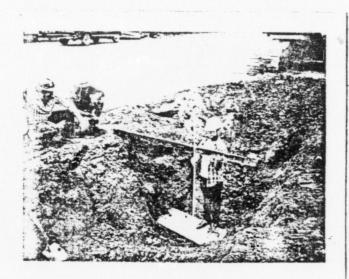


Exhibit "R2"